

Cases and Judgment

1884

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THE 6TH DECEMBER 1852.

PRESENT :

SIR R. BARLOW, BART., }
W. B. JACKSON, ESQ. } *Judges.*

R. H. MYTTON, Esq., *Officiating Judge.*

CASE No. 130 OF 1850.

Regular Appeal from the decision of Moulvee Syed Abbas Alee Khan, Principal Sudder Ameen of Dacca, dated 18th December 1849.

GOUREE PERSHAD ROY, (PLAINTIFF,) APPELLANT,

versus

* LUKHY KANT ROY AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Vakeel of Appellant—Ramapersaud Roy.

Vakeel of Respondents—Gobind Chunder Mookerjee.

SUIT laid at rupees 23,291-10-6, for possession of zemindaree bought at auction.

● Plaintiff alleges that he has purchased a 9 anna share of pergunnah Sooltanpertap at a sale for arrears of revenue, and asserting that he is kept out of possession of certain lands appertaining thereto, sued 57 persons.

Out of the defendants, twenty-three gave in answers claiming to hold their possession of lands within the boundaries given, as belonging to their own estates of various kinds. They also pleaded that plaintiff is only a benamee purchaser, and that the suit to establish this point is pending, and also that plaintiff has sold a portion of the property and cannot sue alone.

The principal sudder ameen, finding that there were, by the plaintiff's own confession, lands of other pergunnahs within the boundaries given in by him, but that there might also be lands of the plaintiff's estate therein, nonsuited him.

From this decision he appeals : but the Court, before going into the merits of the case, deem it proper to hear argument on the issue raised by the respondents, which is to this effect :

Whether a suit laid as this is against such numerous parties claiming to hold separately and under distinct titles, and which does not give the boundaries of each holding, can be admitted and tried ?

Baboo Gobind Chunder Mookerjee, for respondents.—Many of the defendants assert that the land claimed from them appertains to kharija talooks constituted before the decennial settlement, and that within the boundaries there are lands in possession of persons who have not been sued. Others have pleaded that although their lands are within the estate of plaintiff, they constitute valid dependent

An appeal against a non-suit for want of specification of boundaries dismissed.

tenures. Plaintiff has not stated how much land is in each party's holding.

Some of the land within the boundaries specified belongs to other zemindarees. Under such circumstances, without a separate specification of boundaries, the case cannot be tried. The principal sudder ameen has properly held that the plaintiff's plaint is faulty, inasmuch as the boundaries specified in it include lands of other zemindarees. The vakeel of the plaintiff admitted this fact as is recorded in the principal sudder ameen's proceedings.

The vakeel also stated that although the 7 anna and 9 anna shares of pergunnah Sooltanpertap are separately recorded in the collectorate, he could not tell whether the lands were specifically divided or held ijmalee. It would be impossible to give a decree on so vague a plaint as this.

Baboo Ramapersaud in answer.—This suit was nonsuited on 26th November 1847, in consequence of the defendants being numerous and their raising separate issues. On appeal to this Court, a full bench, on 18th March 1848, remanded it, with orders to the principal sudder ameen to try every defendant's pleas. The purchaser cannot tell beforehand what the claim of each opposing party may be.

JUDGMENT.

The ground of nonsuit taken by the principal sudder ameen is, that the plaintiff has not given specific boundaries of the portions of land he claims, but merely the boundaries of a tract, which, it is admitted by him, contains lands to which he has not any claim. This reason is in our opinion sound. The appeal is dismissed with costs.

THE 6TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 204 OF 1851.

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*Regular Appeal from the decision of Moulbee Syed Mahomed Rafiq Khan, Principal Sudder Ameen of Behar, dated 17th February 1851.*

JOODHEE SINGH AND OTHERS, (DEFENDANTS,)  
APPELLANTS,

*versus*

MUSST. RANEE MORADUN, (PLAINTIFF,)  
RESPONDENT.

*Vakeel of Appellants—J. G. Waller.*

*Vakeel of Respondent—Abbas Alec.*

, SUIT laid at rupees 5,818-14-5, being balance of arrears of revenue.

*Mr. Waller*, for the appellants, defendants,—Pleads that defendants had possession to the end of 1245, but not in 1246: thus 1244 is excepted, the suit being for time before and after that year.

The principal sudder ameen says, that defendants say plaintiff got possession in 1246. The point is whether payment has taken place or not, but the principal sudder ameen does not go into that point. The principal sudder ameen alludes only to one receipt; but there are several in the record, no less than seven receipts. I cannot tell which receipt he alludes to; nor does he make any allusion to the full amount of all these receipts, which is above rupees 900. The principal sudder ameen has therefore not given a full decision on the pleas raised in the defence.

*Moonshee Abbas Alec*, on the part of plaintiff.—The remark of the principal sudder ameen applies to all the receipts, not to one only.

BY THE COURT.—We find that the decision of the principal sudder ameen is open to the objection raised on the part of the defendants, viz., that it is confused and unintelligible; that the arguments, which are laid down as conclusive against the receipt, are not applicable to all the receipts, as they are not all for payments on assignments; moreover, that the word receipt is used in the singular number, and it would therefore seem that the allusion was to one out of the seven receipts filed. It was the duty of the principal sudder ameen in his decision to designate and distinguish the

The decision of the lower court being confused and unintelligible, and no judgment having been given on a particular plea, the case was remanded.

receipts pleaded by defendants, by their respective dates and amounts, and to explain on what grounds he rejects each one of them. The case will be remanded for this purpose.

It is also observed that the principal sudder ameen has not given a judgment on the defendants' plea, that two suits have been brought for rent of the same property, in a manner inconsistent with the practice of the Courts, inconsistent with each other, and inconsistent with a former or third suit in which the same plaintiff was nonsuited. This plea should also be considered and decided on.

It is also apparent that this case and the other suit for rent of the same property are so connected together that they ought to be decided at the same time. If the other suit has not yet been decided, the two should be taken up together; but if it has, the principal sudder ameen should be careful to make his judgment in the present case complete and clear as well as consistent with the judgment passed in the other.

The decision of the principal sudder ameen is reversed, and the case remanded to be dealt with as above indicated.

THE 6TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 208 OF 1851.

*Regular Appeal from the decision of Nurhuree Seeromonee, Principal Sudder Ameen of Mymensing, dated 10th February 1851.*

GOPEE MOHUN MULLIK, (DEFENDANT,) APPELLANT.

*versus*

TARAMONEE CHOWDRAIN, (PLAINTIFF,) RESPONDENT.

*Vaheel of Appellant—J. G. Waller.*

*Vaheel of Respondent—Kishen Kishore Ghose.*

APPEAL laid at rupees 7,470-8-9-17, being in part of rupees 16,175-1-1-11, originally sued for on account of interest and costs of suit disallowed to the plaintiff.

This is a suit for rent for eleven years and three months, from 1245 to 1256, with interest thereon, to an amount equalling the principal.

The defendant pleaded that plaintiff would not receive the rent, and that for some time it was deposited in the collectorate until the commissioner forbid the receipt. For this reason, without denying that the principal was due, she objected to any charge for interest.

The best possible evidence to the tenders of payment not having been produced, the appeal was dismissed.

The principal sudder ameen found that the demand of the rent by the plaintiff's servants was proved, and that payment had been refused, on the score of a counter-claim on a bond, which claim has subsequently been decreed. He rejected the plea of tender of payment by deposit in the collectorate as being, for a period anterior to that for which rent is now claimed, and he also rejected as untrustworthy, certain evidence to tender of rent on three different occasions in 1246, 1247 and 1251. Moreover, the amount tendered was only rupees 800, whereas the amount due is rupees 10,000. He further argued that if defendant had been disposed to pay, he would have petitioned in the civil court, and if he had tendered he would have cited his gomashas, who are said to have made the tenders, to prove them. Rejecting therefore the plea of tender, the principal sudder ameen awarded both principal and interest as claimed.

From that part of the award as regards interest and costs, the defendant appeals, on the ground that the tender of payment has been proved.

*Mr. J. G. Waller*, for appellant.—This is a question of credibility of evidence; although the gomashas might have been cited to prove the tender, it is not customary to do so. Four men have given evidence to the point.

#### JUDGMENT.

The Court do not deem it necessary to call upon the vakeel of respondent for an answer. It is as good as admitted, that the best possible evidence to the tenders of payment has not been produced, and the refusal of payment by the same party has, on the other hand, been proved. We are of opinion that the principal sudder ameen was fully justified in decreeing interest and costs. We therefore dismiss the appeal with costs.

THE 6TH DECEMBER 1852.

PRESENT :

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*  
R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 352 OF 1851.

*Special Appeal from the decision of Mr. M. S. Gilmore, Judge of Cuttack, dated 19th February 1851, reversing a decree of Tarakaunt Biddyasagur, Principal Sudder Ameen of that district, dated 26th August 1850.*

CHOWDREE DAMOODUR DOSS, AND OTHERS, (PLAINTIFFS,)  
APPELLANTS,

*versus*

KHETTREBER BIUGWAN RAOT, (DEFENDANT,)  
RESPONDENT.

*Vakeels of Appellants—Ameer Alee and Sumbhoonath Pundit.*

*Vakeels of Respondent,—J. G. Waller, Ramapersaud Roy, and Kishen Kishore Ghose.*

Special appeal of an alleged hereditary moquddum in Cuttack, suing for separation from a zemindar dismissed, the majority holding that the lower appellate court had not allowed his tenure to be as set forth.

THIS case was admitted to special appeal on the 9th September 1851, under the following certificate recorded by Messrs. J. Dunbar and A. J. M. Mills :

“ This suit was instituted by the plaintiffs for the separation of their mouroosee moquoddumee mouza Bingarpore, from the zemindaree of the defendant in zillah Cuttack.

“ The principal sudder ameen dismissed the claim, on the ground of the law of limitation barring the hearing of the suit.

“ The judge affirmed the decision. On special appeal to this Court, the decisions of the lower courts were reversed, the Court holding that the cause of action arose from the 29th of June 1842. The particulars of the case will be found at page 47 of the Sudder Dewanny Adawlut Reports for 1850.

“ The case was then tried on its merits, and is fully set forth at page 15 of the Zillah Cuttack Decisions for February 1851.

“ The plaintiffs aver, that their ancestors acquired the village during the Hindoo dynasty; that the Mogul rulers converted it into a moquoddumee; that they paid the rents from 1208 to 1210 direct to the Malratta officers, and after the British accession, continued the payment to the British collector till 1213, when, at the petition of the defendant's grandfather, they were directed to pay through the latter, with a proviso that they might prefer their claim to separation when the settlement came to be made.

" The defendant admitted the plaintiffs' undisturbed possession of the village, but denied their title, contending that they were mere mustajirs or farmers.

" The principal sudder ameen dismissed the claim. He held that the provisions of Rule IX. of the proclamation embodied in Regulation XII. of 1805, alone governed the case: and it was *not* proved that the plaintiffs had paid the revenue direct to Government for upwards of five years *prior to the 15th of September 1804*, the date of the proclamation.

" The judge stated that the issue arising from the pleadings was, whether towards the close of the Mahratta Government, or according to Rule IX. of the proclamation, the plaintiffs were in possession of mouza Bingarpore, as their hereditary moquddumtee tenure, and paid the rent thereof direct to Government as an independent property for upwards of five years; and for the reasons stated at great length, in his judgment, he did not consider the plaintiffs had established their claim to separation.

" Several reasons for the application are stated, in which we do not find force, but there are questions of law, which arise upon the face of the record, upon which the special appeal must be admitted. The point involved in them, *viz.*, whether the mouroossee moquddums of Cuttack can, under the existing regulations, claim separation from the estates to which their tenures are attached, is one of much importance, affecting as it does the rights of a large and influential class of agriculturists. A few suits for separation were instituted between 1805 and 1820; but we do not find that the question has ever been fully discussed and decided. Stirling, in his valuable minute on the landed tenures of Orissa, says,—' Under this decision, (*viz.*, a decision of the Court of the Sudder Dewanny Adawlut of the 24th of June 1814, decreeing the separation of a moquddumtee tenure in Bhaugulpore,) and adverting to the rules which prescribe that hereditary heads of villages shall be allowed to enter into engagements with the collector in all cases where they may appear to have paid their revenues direct to the officers of the former Government for five years preceding the Company's accession, I cannot but doubt many of the mouroossee moquddums of Cuttack have a right not only to possession of their villages as dependant landholders, but to actual separation.'

" We admit therefore the special appeal to try:—

" *First*,—Whether Clause 9, Section IV. Regulation XII. of 1805, which provides that ' in all cases where the revenue of a village has for upwards of five years past been paid direct to Government by the hereditary moquddum, the settlement for such village shall be made with the hereditary moquddum,' is applicable to the period of the first settlement only, or is a general rule, declaratory of the rights of a particular class?

" *Secondly*,—If it be ruled on the above point that it is declaratory of the rights of a particular class, whether the fact assumed in the lower courts, of the plaintiffs having paid the revenues of their moquddummees for 1208, 1209 and 1210, direct to the Marhatta officers, and for 1211 and 1212 to the British Government, that is, for upwards of five years past, does or does not entitle them to the separation of their village as a proprietary estate from the zemindari to which it was annexed by the collector's order of 24th Assin 1213; or, in other words, what is the legal construction to be put on the words 'upwards of five years past,' that is, up to what date are the five past years to be reckoned?"

" *Thirdly*,—Whether the rule contained in Clause 9, Section IV. Regulation XII. of 1805, above quoted, can be held, under Section XXXVII. Regulation XII. of 1805, to supersede the rules contained in Clauses 3 and 4, Section V. Regulation VIII. of 1793, so as to make the latter inapplicable to claims of separation preferred by the mouroosee moquddums of Cuttack?"

" *Fourthly*.—Whether, if the rules contained in Clauses 3 and 4, Section V. Regulation VIII. of 1793 be applicable, the tenure of the plaintiffs comes within the description of talooks indicated in Section V. of that law?"

*Baboo Ramapersaud Roy*, on the part of the respondent, raises a preliminary objection that the case cannot be heard on the certificate as recorded. The facts upon which the law points raised in the certificate are alleged to be founded, are not discoverable in the decisions of the principal sudder ameen and judge: on the contrary, the judge has found that it is proved that petitioners' tenure is not a mouroosee moquddummees tenure and that petitioners have not paid rent direct to Government for upwards of five years before the date of the proclamation of annexation of Cuttack.

The judge, see paras. 4 and 6, declares that the fact of the moquddummees tenure, which at page 19 of the decision is styled "*hereditary* moquddummees tenure," is not indisputably proved; adding (see page 21) the fact of the hakims or zemindars directing the moquddums to pay their rent to the jemadar of the sepoy, shows that they did not possess an independent right in the mouza.

Again, the certificate records that the fact assumed in the lower courts that plaintiffs, petitioners, paid the revenues for 1208-9-10-11 and 12, that is, for upwards of five years past, "gives rise to the question whether the plaintiffs are or are not entitled to separation of their village as a proprietary estate," whereas (see page 20 of his decision) the judge does not find that fact; his words are "being less than five years."

Under these circumstances, the alleged facts not being on the record, the argument of law on the grounds set forth does not arise.

The judge has determined that the rent was not paid for five years at all; and be the period what it might, it was not paid *direct*. Under the precedent at page 388, Select Reports, volume VII., that fact having been found by the judge, this Court cannot interfere, and the provisions of para. 9 of the proclamation in Section IV. Regulation XII. of 1805, which declares that in all cases where the revenue of a village has for upwards of five years *past been paid direct to Government by the hereditary moquddum*, the settlement for such village will be made with the hereditary moquddum, does not support plaintiffs' petitioners' claim.

*Moonshee Ameer Alee, contra.*—The pleas above urged are not good. The certificate does apply to the case and is correctly drawn. The principal sudder ameen, it is clear, held that my clients' hereditary moquoddumnee right was established; but though he did find that they had paid for the five years 1208-9-10-11 and 12, he did *not* find that they had paid upwards of five years *direct*, and therefore, under paragraph 9 of the proclamation, dismissed the plaint, and would not allow a separation of the village.

My clients, of course, were satisfied with declaration of their hereditary moquoddumnee right, and only appealed against so much of the principal sudder ameen's order as regarded the rejection of our prayer for separation, under Section IX. above referred to.

The principal sudder ameen's decision is affirmed to a certain extent, so far as petitioners' title to engage for the Government revenue of mouza Bingarpore is disallowed; on the other point, the separation, the judge has merely declared that there is no obstacle to the respondent instituting proceedings in due form to contest the correctness or otherwise of the proceedings of the revenue authorities. The certificate cannot, with reference to what is now urged, be held to be of no application or effect in this case.

The next objection raised to the certificate, that it records that rents were paid for upwards of five years, such statement not being in the judge's decision, is wrong. The certificate only inquires "what is the legal construction to be put on the words five years past, that is, up to what date are the five past years to be reckoned," controverting the opinion of the judge, who, in para. 2 of his decision, says, "it is necessary that proof of payment of rents for five years previous to the 15th September 1804, the date of the proclamation, be required:" para. 9 of the proclamation refers to *direct payment to Government*. The payments are from 1208 to 1210 to the Mahratta officers. It is on the ground that the rents were not paid to the British Government for five years, that the judge has made use of the words "*less than five years*," and has applied the provisions of para. 9 of the proclamation to my clients. But it may be proper to show, and it is not difficult, that the terms "upwards of five years past" apply to a period subsequent to the issue of the proclamation.

On the third point of admission, it is to be observed, that my clients' possession is long antecedent to the proprietary right of the zemindar, and therefore, under Clauses 3 and 4, Section V. Regulation VIII. of 1793, my clients must be held to be actual proprietors of the lands.

*Sumbloonath Pundit* in support of *Moonshee Ameer Alee*.—The wording of the certificate is positive, I admit, but the admitting judges had no alternative to record their opinions otherwise than they have done. They could not treat the judge's decision otherwise than as confirming the principal sudder ameen's decree. If the respondent did appear before the Court and put in his pleadings, his case was not heard; for the judge, not being satisfied with what was urged by my clients, dismissed their appeal, which was only on the point of payment of rent for five years, not touching the question of *mouroosee moquddumtee* tenure, which the principal sudder ameen had given in my clients', the petitioners', favor.

The passages quoted from the judge's decision are not so positive and decisive as respondent would make them out. All that appears is that the judge did not consider himself empowered to dispose of the point as to the *moquddumtee* right.

But suppose, for the sake of argument, that the judge has pronounced an opinion on that point, and that the respondent did appear and answer the appeal below, it was beyond the competence of the judge to pass that opinion. The admitting judges considered so much of the *zillah* judge's opinion surplusage, and construed the decision to be one confirming that of the principal sudder ameen. The Construction No. 868 only allows a respondent appearing to answer an appeal, to argue upon so much of the case as is brought forward by the appellant in his application for appeal. The question of the nature of our tenure was quite beyond the grounds urged in our appeal.

*Mr. Waller, contra*, in reply.—The real objection we make is, that the certificate has assumed facts not to be found in the judge's decision, and on them laid down certain points under Act III. of 1843, for decision. Sections VII. and VIII. of the law bar farther proceeding under the above circumstances; for nothing new can be added to the certificate. No amendment of it can be made upon the points upon which the special appeal has been admitted, for the points do not arise out of the facts as found by the judge.

#### JUDGMENT.

**SIR R. BARLOW.**—The certificate states that there are questions of law which arise upon the face of the record upon which special appeal must be admitted. The point involved in them, *viz.*, whether the *mouroosee moquddums* of Cuttack, can, under the existing regulations, claim separation from the estates to which their names are attached, is one of much importance.

The principal sudder ameen dismissed the petitioners' plaint under the provisions of paragraph 9 of the proclamation embodied in Regulation XII. of 1805, recording his opinion that plaintiffs had a moquddumnee right, but they had not proved that they had paid the revenue direct to Government for upwards of five years prior to the 15th September 1804, the date of the proclamation, and therefore under the law quoted it would not stand.

In appeal to the judge the plaintiffs urged that Regulation XII. of 1805 was not the sole law under which their claim should be tested; that other laws, more especially Clauses 3 and 4, Section V. Regulation VIII. of 1793 were applicable to the case.

The judge records that after a full and careful consideration of the pleas and objections advanced by either party, he is of opinion that Regulation XII. of 1805 is the principal regulation by which the decision of the Court must be guided, and quotes para. 9 of the proclamation of the 15th September 1804. The point for decision he lays down to be, whether, according to para. 9, the appellants before him, the petitioners, were in possession of mouza Bingarpore as their *hereditary moquddumnee tenure*, and paid rent thereof *direct to Government as an independent property for upwards of five years*. With reference to these points he did not, for the reasons assigned, consider that the appellants had established their claim.

In para. 1 of his decision, he clearly states that the petitioners have not adduced a single document to show that prior to the cession of the province to the present Government, either Narain Chotra, or his father, held the office of amil or wohdadar; and that they were *zemindars*, and the appellants' ancestors paid their rent through them to the Mahratta Government.

In para. 2, he shows the grounds on which he distinctly records that the payments of rents were for a period "*less than five years*;" and in paras. 4 and 5, specifies his reasons for rejecting the documents filed by the petitioners to prove their moquddumnee mouroosee tenure. In the last para., 6, he founds his decision on para. 9 of the proclamation of the 15th September 1804, and records that, in his opinion, the provisions of Regulation VIII. of 1793 cannot affect the decision of the particular case under consideration, however much it may be applicable to moquddumnee tenures in general, as the appellants have filed no sunnud to show on what conditions they acquired (as alleged by them) the moquddumnee tenure. "With reference to the particulars above detailed," the judge dismissed the appeal, and made, on the objection of the respondent to the order of the principal sudder ameen, recording that the mouza was the mouroosee moquddumnee property of the appellants, a proviso, that such order should be "no obstacle to the respondent instituting proceedings in due form to contest the cor-

rectness or otherwise of the proceedings of the revenue authorities," &c.

The four grounds on which the special appeal is admitted are given at length in the certificate.

On the *first* ground taken, I would observe that, whether para. 9, Section V. Regulation XII. of 1805 "is applicable to the period of the first settlement only or is a general rule declaratory of the rights of a particular class," can only be a question in this case when the fact shall have been proved that plaintiffs, petitioners, are hereditary moquddums, who have paid direct to Government for upwards of five years. But where is this fact found in the decision of the judge against whose order the special appeal is laid? The petitioners would convert the permissive order into a declaration of their right as mouroosee moquddums. Thereby, noticing the irregularity of this order, how can it be construed to mean a confirmation of the principal sudder ameen's judgment, in the face of the very clear and explicit terms used by the judge to indicate his full conviction that the plaintiffs had no ground to a claim of rights as mouroosee moquddums? And it may further be urged, of what benefit would it be to the plaintiff to declare them mouroosee moquddums, when, by the finding of the judge, it is established that they *did not pay for upwards of five years* previous to the proclamation *direct to Government*? In order to obtain judgment in their favor, it was incumbent on them to establish two facts, for proof of *both* is necessary:—*first*, that they were mouroosee moquddums; and *secondly*, payment for upwards of five years, as above, direct to Government. The judge, with whose finding on the facts we cannot interfere, does not, as I understand his decision, hold either of the requirements of the law to have been established.

Upon what basis then are the points, on which the special appeal is admitted, raised? The discussion and determination of points of law inapplicable to the case of the plaintiffs in consequence of the judge's finding, would be inoperative. I would dismiss the appeal with costs.

MR. R. H. MYTTON.—I concur with Sir Robert Barlow in opinion that this appeal must be dismissed, as the points taken by the admitting judges of this Court are founded on an assumption of facts which are not declared by the zillah judge to be established. These are, that the plaintiffs are hereditary moquddums, and that they or their ancestors have paid their revenue direct to Government for five years. The zillah judge has given his opinion very clearly, that it has not been proved that the plaintiffs are hereditary moquddums; and the fourth paragraph of his judgment shows it to be his opinion that, of the period of payment sought to be considered as a payment to Government, the rent for that portion

which preceded our rule, was not paid to the hakims as by a sudder malgoozar to Government, but as a tenant to them in their capacity of zemindar. The appeal is dismissed with costs.

Mr. W. B. JACKSON.—In this case the plaintiffs sued to obtain a separate settlement of their estate with Government, stating that theirs was a mouroossee moquddummee tenure in Cuttack, and that under the law they had a right to a separate settlement and to pay their revenue direct to the Government treasury. The law which regulates such settlements in Cuttack, is Regulation XII. of 1805, and the Government proclamation of 15th September 1804, which is embodied in that law. Clause 9 of the proclamation is the portion of the law on which the plaintiffs mainly relied for the substantiation of their right, and more especially the expression that “a separate settlement shall be made with mouroossee moquddums, who have paid revenue direct to Government for five years past,” which is found in Clause 9 of that proclamation.

The defendant denied that plaintiffs were mouroossee moquddums, and further that they had paid revenue direct to Government for five years past, as contemplated in the law; and on these two points issue was joined.

The principal sudder ameen found that the plaintiffs had proved themselves to possess a mouroossee moquddummee tenure, but not that they had paid revenue direct to the Government for five years before the date of the proclamation, as contemplated in the law; he dismissed the suit.

The plaintiffs appealed on the latter point only to the judge, and the defendant appearing also, questioned the former point, which had been found in the plaintiffs' favor.

The judge went into the whole case, and decided against the plaintiffs' appeal on the latter point, the five years' payment. He alluded to some of the evidence on the former point, but gave no decision upon it: on the contrary he says, at the close of the decision, that the finding of the principal sudder ameen on the validity and nature of the tenure, would not prevent the defendant from instituting a suit to question the correctness of the proceedings of the revenue authorities. He confirms the decision of the principal sudder ameen. Now the plaintiffs appeal specially to this Court; and the admitting judges record four points for trial:—

The *first* is a pure point of law, viz., whether the expression in Clause 9, above cited, is applicable to the first settlement only, or is a general rule declaratory of the rights of a class of tenants?

The *second* is, whether under the facts on record as found by the judge, the plaintiffs can benefit by that law, with reference to the words “upwards of five years past”?

The *third* is, whether the provisions of Regulation VIII. of 1793 apply to the Cuttack cases, with reference to Regulation VII. of 1822?

The *fourth* is, if applicable, how that law, Regulation VIII. of 1793, applies to the plaintiffs' case?

On the case coming up for trial, the defendant's pleader says the points in the certificate cannot be tried, because he avers the judge has found against the plaintiffs on both points, *viz.*, the nature of his tenure, and the payment for five years.

Now admitting, for the sake of argument, that his averment is correct, it forms no reason whatever why the points recorded in the certificate should not be tried. If the plaintiffs be not *mouroossee moquddums* and have not paid to Government for five years, the decision on point No. 2 will be against them, but this is no reason why we should not try the point. But there is no reason why the meaning of the law, referred to in point No. 1, should not be declared; or why that law, after interpretation of the difficulty which really exists, should not be applied to plaintiffs' case by the determination of point No. 2. Precisely the same reasoning applies to points Nos. 3 and 4. They should all be tried. The facts found by the lower court are not open to question here; but however much they may be against the plaintiffs, they do not prevent us from trying the points of law, nor from applying the law to the case as shown by the facts.

Assuming therefore that the assertion of the defendant's pleader is true as to the judge's finding on the facts, there is no reason whatever for not trying the points. I would therefore proceed to try them.

But the assertion is not correct. The judge has not declared on either facts against the plaintiffs. As to the five years' payment, the judge admits in express words that he has paid for five years direct to Government, *viz.*, from 1208 to 1212, both years inclusive, but adds that, although this is the fact, the payment was not for *the five years* contemplated in the law: and whether they were or were not the particular years contemplated by the law, is the very point in the certificate, and is a point of law, not of fact. As regards the finding upon the nature of the tenure, in the first place, this is not a point of fact, but of the construction of documents and inferences from facts. Moreover, the judge has not given a decision on this point at all; but affirms, without reservation, the decision of the lower court, which declared the plaintiffs to have established their plea as to the nature of their tenure.

It seems to me that the arguments which have been advanced by the respondent throughout the trial of the case, are in support of the decision on the 2nd point of the certificate against the appellants, rather than in support of the respondent's plea, that the Court cannot decide that point, and, in fact, that that point has been decided by my colleagues: for that point was the applicability of the Clause 9 above cited to the plaintiffs' case, under the circumstances. Now my colleagues have declared that, under the facts as found by the lower

court, that clause does not apply to the 'plaintiffs' case, by which declaration they decide the very point at issue, *viz.*, whether it does or does not apply, although this issue has not been heard or argued. It appears to me that this issue in bar has been ingeniously devised by the counsel for the respondent, with the view to obtain a decision in his client's favor, without the arguments of his opponent being heard, and that he has gained his object.

THE 9TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*  
R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 201 OF 1851.

*Regular Appeal from the decision of Tarakaunt Biddyasagur, Principal Sudder Ameen of Cuttack, dated 31st December 1850.*

MOHUNT MUDHOOBUN DASS, (DEFENDANT,)   
APPELLANT,

*versus*

HUREY KISHEN BHUNJ, (PLAINTIFF,) RESPONDENT.

*v. Vakeel of Appellant—Kishen Kishore Ghose.*

*Vakeels of Respondent—Ramapersaud Roy and Gobind Chunder Mookerjee.*

APPEAL laid at rupees 3,057-7-4, for possession of movable and immovable property left by Sreekur Bhunj, deceased; suit originally valued at rupees 9,731-11-4.

*Baboo Kishen Kishore Ghose*, for the appellant—Urges that the claim is on the *agian putr*, or *hibbanama*, which is not proved, and the principal sudder ameen decrees on the ground of succession by inheritance. This is not legal, and the plaint cannot stand in the present form, which relies on the *hibbanama*, and afterwards says that the claim is by inheritance. There is no mention of the adoption in the *hibbanama*; it is no proof therefore of the adoption.

*Baboo Ramapersaud Roy*, in answer.—The claim is by inheritance, and the mention of the *hibba* is incidental. The claim includes other property besides that mentioned in the *hibba*. It could not, therefore, be intended to limit the claim by the *hibba*; and some property mentioned in the *hibba* is not claimed in the plaint. The *hibba* is mentioned as proof of the claim to certain property which was bought in the name of Rughoonath, and to which he could not establish his right without reference to the *hibbanama*, in which

A party having become a byrager, but retained the style and title of raja, and mixed in worldly affairs, and continued with his family, was held not to have become an ascetic, or religious devotee, to such an extent as to exclude his adopted son from succeeding to his property, whether acquired before or after his becoming a byrager.

it is mentioned the plaintiff distinctly stated to the principal sudder ameen when the issues were drawn that he claimed by inheritance.

*Baboo Kishen Kishore Ghose*, in reply.—Evidence has been heard to the *hibbanama*.

BY THE COURT.—We are of opinion that, with reference to the terms of the plaint and the terms in which the issues were recorded in the lower court, the principal sudder ameen was competent to try this case on the issue of the right of the plaintiff by inheritance, and that the claim is not limited by the terms of the *hibbanama*.

*Baboo Kishen Kishore Ghose*, on the fourth Issue.—Plaintiff says his father was not a byragee, but took a maintenance and went to Persotum Chutr, and there bought some *lakhiraj* land. Plaintiff denies his father was a *bishnob*. The principal sudder ameen says it is proved that his father was a *bishmob*, by the evidence of both parties; but that if a *bishnob* remains with his family, he does not thereby prevent his heirs from succeeding. This decree is therefore not according to plaintiff's statement.

On the fourth Issue, again,—The principal sudder ameen considers the adoption proved by two documents, Nos. 108 and 110, and three witnesses' depositions. This I deny. Those documents do not prove the adoption, and they are not proved; nor is there any sufficient evidence of that fact. The evidence of the witnesses is merely hearsay, not direct evidence: moreover, the son was alive, and the adoption was not therefore legal. This is proved by plaintiff's own statement.

THE COURT ask whether this legal objection to the adoption was taken in the lower court.

Counsel replies that it was not.

BY THE COURT.—The majority of the Court think that the validity of the adoption on legal grounds cannot be called in question, no such question having been raised in the lower court, where the plea was simply that the fact of the adoption is not established.

SIR R. BARLOW.—The plaintiff pleaded that Raja Sreekur Roy's own son was alive, said that he was insane and was repudiated on that account, and the plaintiff was then adopted.

The defendant in his answer did not meet these averments plainly and explicitly. He merely said the adoption was false generally, and that the alleged insanity of Dhunnunjee, the raja's own son, was equally false. He did not plead to the mixed law and *fact* now raised that the existence of Dhunnunjee, the raja's own son, whether sane or insane (for no inquiry as to the point of sanity was made), was a bar to plaintiff's claim as adopted son. Many issues might have arisen on such a pleading; but the question which arises out of a matter-of-fact as to the sanity of Dhunnunjee, not having been raised in the court of first instance, the appellant is not entitled to raise it in appeal. The defendant in his answer

admits that if a son is insane then the other sons inherit. The *existence* of an insane son then would not bar the adoption of the plaintiff under the defendant's own admission. But the inquiry as to the fact of sanity or otherwise has not been made; and the Court could not determine the right of the plaintiff without a finding on this fact but for the course which the defendant has adopted.

MR. R. H. MYTTON.—Although there is no general rule of this Court that a point of law not taken in the court below shall not be raised in appeal, it appears to me that it would not be proper to allow the objection now for the first time raised to the legality of the adoption on the ground of the adopter having at the time a son of his own alive, to be heard; for in the lower court the defendant has only challenged the fact of adoption, which line of pleading amounts, in a great measure, to an admission of the legality of the fact, if proved. Such a plea as that now raised would have entirely altered the complexion of the case; would have required an inquiry into the ruling of the Hindoo law on the point as it may have been current in that part of the country, and probably of the particular customs of the family of the Goomsoor Rajas: I would decide against the appellant on this issue.

MR. W. B. JACKSON, on this point, differs, as he considers the legality of the adoption questionable on the facts as on record in this Court, although it was not questioned in the lower court.

*Kishen Kishore Ghose* continues.—As the *hibbanama* is dated subsequent to the adoption as alleged, why is the party not called an adopted son in that document? There is no proof whatever of the fact of the adoption.

*Baboo Ramapersaud Roy* answers.—The evidence of the adoption is wholly oral and documentary. The two documents alluded to are good, and no objection has before been made to them on the score of their not being proved. They are signed with official signatures, and are admissible without further proof. Twelve years before the death of Sreekur this plaintiff received an allowance from Government as the adopted son. These documents prove this fact. The *hibba* is but a few lines; and there seems to have been no reason why the adoption should be there mentioned.

Reads the petition of Sreekur Bhunj to the collector of Cuttack, calling the plaintiff his adopted son.—Reads a letter applying for a document which the agent refused to give him.

The oral evidence to the fact of adoption is clear. The principal sudder ameen selects three witnesses as men of rank and position. They say that Sreekur Bhunj told them that plaintiff was his adopted son. Gopeenath Nund, witness, says he saw the formal ceremony of adoption take place.

BY THE COURT.—The fact of the adoption is established.

*Baboo Kishen Kishore Ghose* continues.—The mere fact that a *bishnob* takes money from his own estate, does not prevent him

rom being a religious mendicant.—Reads *bywustas*, cites Macnaghten's Hindoo Law, volume II. Section VII. page 101, case 3. "Supposing the mendicant to have actually left the order of an householder, and to have become an ascetic," the pupil succeeds to the exclusion of the brother. Cites also Strange's Hindoo Law, chapter 6, para. 1, page 150, to the effect that the property of ascetics, sunyassees, or ghosains go to their chelas.

A man may become a religious devotee at any time. Admits that if a man becomes a devotee, he forfeits all right to ancestral property, but any property he may subsequently acquire belongs to him. The claim of defendant is restricted to the property acquired after the deceased became an ascetic. There is no proof that after that time he had any communication or intercourse with his son and family; and the principal sudder ameen finds this fact without sufficient foundation.—Reads the mookhtarnama of deceased, in which he calls himself *Mohunt Raja Sreekur*, and mentions Rughoonath as his *chela* or disciple.

This document is admitted by both parties to be genuine. Plaintiff never claimed during the year of notice in Benares, when the property was under dispute.—Reads evidence to the effect that the deceased was a regular byragee, and was regularly elected a mohunt by the akhara. Asserts that the plaintiff's witnesses prove that the deceased became byragee, and was not a raja.

*Baboo Ramapersaud Roy* answers.—Admits deceased was a bishnob, but not so as to deprive his heirs of the right to succeed to his property which he acquired after he become a *bishnob*.—Reads from the *Mitacshara*, and refers to Menu's Institutes, p. 39, v. 175, also to Section VI Menu, page 145, chapter 6, *vs.* 2 and 33, to show what kind of religious devotee is meant by the law. The deceased never became a sunyassee though he was a byragee.—Refers to *Fulton's Reports* vol. I. Supreme Court, page 217. The distinction between a byragee and a regular religious devotee was admitted in that case. The deceased carried on business of the world. He bought a ship, and accumulated private property. He lived with his adopted son. He cannot therefore be said to have "abdicated all worldly rights" as mentioned in Strange's Hindoo Law, in the passage cited by the opposite party.—Reads evidence to the fact that deceased went about as a raja with surwaree and clothes, &c., like other rajas in a palkee. He received a pension of rupees 8,000, a year from Government as raja.

*Baboo Kishen Kishore Ghose* was heard in reply.

#### JUDGMENT.

MESSRS. JACKSON AND MYTTON.—The Court has already ruled on the arguments heard on both sides that the fact of the adoption has been established, and that the legality of that adoption is not now open to question. It remains only to declare on the point last

argued whether the fact of the deceased having become a byragee is established; and whether this withdrawal from the world, and retirement from secular affairs and occupations, were such as to bar the succession of the adopted son to the property acquired by deceased subsequently to the period of his becoming an ascetic, and to constitute a right in his chela or disciple to succeed to it in preference to the adopted son. There is now no dispute regarding any other portion of the property.

It seems, from the authorities cited, that every person calling himself a byragee does not thereby exclude the legal heirs from succession to his property subsequently acquired. To become a religious ascetic and exclude his heirs from succession to property subsequently acquired, he must *bonâ fide* retire from all worldly affairs, and in fact become, as it were, dead to the world, leaving all the property then vested in him to the legal heirs, who succeed to it at once. There seems to be no doubt that the deceased joined the sect of byragees, and was elected a mohunt or superior of one of their monasteries; but he still retained the title and style of raja, and used this title in his legal affairs. He carried on worldly affairs, and communicated with his family, and drew from Government a pension of rupees 8,000 a year as raja, in which capacity it was granted to him. A strong presumption arises that the property in question was part of or acquired by the use of part of that very pension, and not in the exercise of the functions of a byragee or recluse. The deceased cannot, therefore, be considered to have become a religious recluse to such an extent as to exclude his legal heirs from succeeding to the property in question. The right of the legal heir to succeed therefore is established, and no sufficient ground has been shown for setting aside the decision of the lower court. The decision is, therefore, affirmed, with costs of appeal against the appellant.

SIR R. BARLOW.—The *fact* of the plaintiff's adoption is not denied by the defendant in his answer. It is impugned upon the ground that Raja Sreekur Bhunj having become a recluse and ascetic, he could not under Hindoo law make an adoption.

The evidence is by no means satisfactory on this point. On the contrary, it is clearly shown, not only by the evidence adduced by the plaintiff, but also by the exhibits on the record, that Sreekur Bhunj called himself raja, transacted business, received a pension from Government as raja, and carried on suits in court. He cannot, therefore, be considered one of the classes of Hindoo devotees, who, in consequence of having relinquished all worldly affairs and given themselves up to religion, are declared by the Hindoo law incapacitated from bequeathing or giving away their property or adopting a son. I see no reason to interfere with the decision of the principal sudder ameen, which I propose to confirm in all its integrity.

THE 9TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 379 OF 1851.

*Special Appeal from the decision of Baboo Punchanund Bonnerjee, Acting Second Principal Sudder Ameen of Chittagong, dated 25th March 1851, reversing a decree of Moulvee Syed Ahmud, Additional Moonsiff of Deang, dated 6th March 1849.*

COLLECTOR OF CHITTAGONG, (ONE OF THE DEFENDANTS,)  
APPELLANT, \*

*versus*

GOOROODASS PALL, (PLAINTIFF,) RESPONDENT.

*Vakeel of Appellant—Ramapersaud Roy.*

Suit against  
Government  
for abatement  
of assessment  
of a talook  
settled under  
Regulation  
VII. of 1822,  
cannot be heard  
in the civil  
courts.

THIS case was admitted to special appeal on the 18th September 1851, under the following certificate recorded by Messrs. J. Dunbar and A. J. M. Mills:—

“On the 23rd December 1840, one Gooroodass purchased at a sale for arrears of the Government dues, the *noabad* talook, Wasil Abdoor Rusheed and Ruhmut Alee, bearing a jumma of rupees 9-11-7. The settlement papers (of the year 1837) give the area of this mehal as 9 kanees, 14 gundas, 3 chittaks, 1 krant of productive, and 13 gundas of waste land. When the purchaser took possession he found a deficit of 2 kanees, 6 gundas, 3 chittaks, and 1 krant, and he thereupon sued the former proprietors for recovery. He succeeded in recovering from them 1 kanee, 3 gundas and 1 krant, and he then brought a suit against Government for an abatement of jumma, proportionate to the extent of land still wanting.

“The moonsiff dismissed the suit. In appeal the principal sudder ameen held that a *noabad* talookdar could justly demand, and is entitled to an abatement of jumma under such circumstances. He therefore reversed the decision of the lower court.

“The application for special appeal is made on the ground that in a tract of country in which Government is zemindar (not as zemindar under the Regulations of 1793, but as proprietor, in its capacity of ruling power, by reason of the land having been unappropriated at the time of the decennial settlement, and of the consequent absence of parties with a right of ownership under the law,) and in which Government vests certain parties with the limited rights of Mofussil talookdars, the courts cannot interfere,

directly or indirectly, to alter the assessment fixed by the officers of Government, being barred from such interference by Clause 3, Section XIV. Regulation VII. of 1822.

"The question raised in the application involves a determination of the exact nature of the assessment placed upon the *noabad* talooks and of the rights of Government, and the talookdars respectively after settlement. We are not aware that the question has been finally disposed of by a judicial award of competent authority, and as we consider it to be one of much importance, both to the Government and to a large body of talookdars, we admit the special appeal to try whether the courts are or are not competent to take up and adjudicate claims having reference to the terms of settlement between Government and the *noabad* talookdars."

\* JUDGMENT.

SIR R. BARLOW AND MR. R. H. MYTTON.—The privilege of reducing the assessment of the Government revenue was, under Section LXX., Regulation VIII. of 1793, reserved to the Governor General in Council. This Court so far back as 1817\* ruled that the power of altering the assessment on any estate is not vested in the courts of judicature, and the later settlement law, Regulation VII. of 1822, Clause 2, Section XII. Clause 1, Section XIII. and Clause 3, Section XIV., declares that in assessments made under it (and of which nature that on the plaintiff's talook appears to be) the courts of judicature are not to interfere. No question has in this case been raised whether the Government, in making the settlement, acted as a zemindar or as the ruling power. It is in its capacity of ruling power that it has been sued, and against it in that capacity the suit cannot be heard. The decision of the principal sudder ameen is reversed with costs.

MR. W. B. JACKSON.—The terms of the certificate are general and refer to all claims *which have reference to the terms of settlement* between the Government and the *noabad* talookdars. But it is only necessary to determine it as regards the case before us. I do not think the Court is bound to give a general opinion with regard to all possible claims which have reference to the terms of settlement. But the present claim is for an abatement of jumma on the ground of defect of assets. The assertion is that the engagement of the Government was to give possession of a certain quantity of land, in consideration of which the Government was to receive a certain rent; but it is not shown that the Government did engage to give possession of a certain quantity of land, or that there has been any breach of engagement on the part of Government. The claim to abatement depends on the fact whether the Government

\* Vide Volume II. Sudder Dewanny Adawlut Reports, page 244.

has failed in performing its engagement. The fact that the assessment was made by measurement by no means proves that the Government engaged to put the claimant in possession of a certain quantity of land by measurement; so that there could be no breach of engagement on the part of the Government.

Again, the nature of the engagement between the Government and the zemindar is not binding positively on the zemindar. The zemindar may at any time allow the estate to fall in balance, and the zemindaree ought to be sold. He is not bound to retain the zemindaree and to pay the revenue. The contract is therefore voidable at pleasure, by the zemindar giving notice that it is at an end. I think, therefore, that no suit will lie against Government for abatement of revenue on the ground alleged. I would therefore reverse the decision and dismiss the claim with all costs against plaintiff.

THE 9TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 419 OF 1851.

*Special Appeal from the decision of Mr. W. J. H. Money, Judge of Backergunge, dated 2nd April 1851, affirming a decree of Moulvee Kulleem Ooddeen Khan, Principal Sudder Ameen of that district, dated 20th April 1848.*

MUSST. SIDISSUREE, (DEFENDANT,) APPELLANT,  
*versus*

GOLAB DEYEE, (PLAINTIFF,) RESPONDENT.

*Vakeel of Appellant—Ramapersaud Roy.*

*Vakeel of Respondent—Kishen Kishore Ghose.*

Plea urged that plaintiff could not under circumstances stated sue, rejected in special appeal, no objection to that effect having been taken in the courts below.

THIS case was admitted to special appeal on the 24th November 1851, under the following certificate recorded by Messrs. A. Dick and J. Dunbar:—

MR. J. DUNBAR.—“The judge’s decision in this case is dated 2nd April 1851, and is the first of the printed decisions of zillah Backergunge for that month.

“The application is on the ground that as the plaintiff in her plaint disclaims the proprietary right in the estate, stating that she had transferred her right to her daughter, this suit, on account of arrears of rent belonging to that estate, could not be brought by the plaintiff in the absence of her daughter. A reference to the plaint itself shows that the objection is just. The plaintiff therein dis-

tinently sets forth that she had transferred her zemindaree to her daughter, Munglee Deyee, and constituted her proprietress by a deed to that effect; and proceeds to say that she was suing for the balance of rent due by the defendant, with her daughter's sanction and permission, because the name of the latter had not yet been registered as proprietress in lieu of her own. It appears to me that such a plaint is irregular and cannot be admitted. As the plaintiff clearly admits that she has divested herself of her zemindaree rights, she cannot be allowed to exercise the important one of realizing outstanding rents, by the institution of legal proceedings. I admit the special appeal to try whether the suit should not have been dismissed on these grounds, and whether, therefore, the decision of the judge must not be set aside."

MR. A. DICK.—"I would not admit this plea. It might have been urged, and most certainly would have been urged in the answer to the plaint, had the gift been fully carried out, and possession actually given to the daughter. There is nothing in the plaint declaratory of possession having been given. On the contrary, plaintiff expressly states that the transfer was not complete, and she continued to carry on suits for arrears of rent, because her daughter's name had not been duly registered in the collectorate. This is tantamount to declaring that she was in possession herself; therefore I see nothing in the plaint itself sufficient to render her suit inadmissible. Had plaintiff not been in possession the objection would most assuredly have been taken in the answer. It involves, in truth, a matter of fact, and cannot be urged in my opinion in special appeal. It is allowing the petitioner to take advantage of her own wrong."

*Baboo Ramapersaud Roy*, for appellant.—The plaintiff clearly disclaims all proprietary rights, having given them over to her daughter, Munglee Deyee, and has not made a plaint jointly with her. The plaint cannot be heard.

*Baboo Kishen Kishore Ghose*, *contra*.—This plea has not been raised in the courts below. Had it been put forward in the first instance it might have been met, and the defect, if any, been remedied.—Quotes Moore's Indian Appeals, Volume III. part 2, p. 242. Case of Dhurm Dass Payrey, appellant, *versus* Shama Soondree Debbea. Quotes also the Sudder Dewanny Adawlut Decisions, 7th August 1851, case of Musst. Surmutoonissa Khatoon *versus* Gopal Kishen Roy Chowdree, p. 484. The original plaintiff, Golab Deyee, is now dead, and I appear for Munglee Deyee, the daughter, who succeeds her.

*Ramapersoud*, in reply.—Quotes p. 6, Sudder Dewanny Decisions of 1850, in which it was ruled that a party selling cannot reserve to himself the right of bringing any suit regarding it.

#### JUDGMENT.

The original plaintiff, Golab Deyee, distinctly set forth in the plaint, as the ground for bringing the action in her own name, that

the name of her daughter, Munglee Deyee, had not been registered. She was in possession and sued for rents. The defendant did not plead any irregularity in the form of the action in the lower courts. There is therefore no ground for the admission of the plea that the suit cannot be heard by reason of defect of parties. We reject the appeal with costs.

THE 13TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 216 OF 1851.

*Regular Appeal from the decision of Mr. H. V. Hathorn, Judge of Sarun, dated 31st January 1851.*

MUNOHUR DASS AND ANOTHER, (PLAINTIFFS,) APPELLANTS,

*versus*

BHOWANEE SAHEE AND OTHERS, (DEFENDANTS,) RESPONDENTS.

*Vakeel of Appellants—J. G. Waller.*

*Vakeel of the Respondent Jhujja Koonwur,—Ameer Alee.*

*Vakeels of the Respondent Rughoolur Sahee,—Ramapersaud Roy and R. Norris.*

Judgment  
with costs  
given against  
parties admitting  
the claim.

SUIT laid at rupees 2,986-10-6, for the recovery of a debt on a bond with interest.

*Mr. J. G. Waller*, for appellants.—The judge makes three of the defendants, Bhowanee Thakoor, Dhunessur, and another, pay their own costs on their admission of my claim. True the judge says their admissions must not be allowed to affect the joint interests of their co-partners; but the fact of co-partnership is not proved in the judge's opinion. At all events, I am entitled to a decree against the above three parties with whom I settled amicably, *pendente lite*, and they have not appealed.

Now for the 2nd issue.—It turns upon the value of the plaintiffs' evidence and upon that for the *alibi* pleaded by the defendants. I submit that there is nothing on the record which is calculated to throw discredit on the testimony of Hurruk and Bheiroo.

*Moonshee Ameer Alee, contra.*—The bond is not registered, and is not satisfactorily established, as the judge has recorded. The grounds of his discrediting them are clearly laid down.

## JUDGMENT.

We concur with the judge, that the evidence is not satisfactory or sufficient for judgment against the respondents Rughoobur Sahee, Dicha Koonwur and Musst. Het Ranea. As however the three defendants, who in their answers admitted plaintiffs' claim, have not appealed, on the point of costs, we pass judgment against them to the extent and upon the strength of their admissions. The respondents will recover their costs from the appellants. Costs in favor of plaintiffs against the parties who confessed judgment.

THE 14TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., } *Judges.*  
W. B. JACKSON, ESQ., }

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 431 OF 1850.

*Regular Appeal from the decision of Mr. A. Davidson, Principal Sudder Ameen of Midnapore, dated 12th April 1850.*

KURALEE PERSAUD DASS AND OTHERS, (DEFENDANTS,) APPELLANTS,

*versus*

NURSINGH SEIN AND OTHERS, (PLAINTIFFS,) RESPONDENTS.

*Vakeel of Appellants—Ramapersaud Roy.*

*Vakeel of Respondents—Gobind Chunder Mookerjee.*

SUIT laid at rupees 8,119-2-10 for possession of lands with wasilat.

*Baboo Ramapersaud Roy.*—Plaintiffs sue for possession and mesne profits of 189 beegahs in Neej Ichapore *versus* sixteen defendants. In answer it is urged that the land is in Gurmakora. The land is in excess of 100 beegahs, and being *lakhiraj*, the right is with Government. The principal sudder ameen sent the case to the collector for report on the question of *mal* and *lakhiraj*, and decided in plaintiffs' favor for *resumption* of the land.

The case of Hurkaunt Sein *versus* Kalee Kishore Roy, at page 690, Decisions, 15th July 1852, is exactly in point. The majority of the Court ruled that in a case of this nature, the validity of a *lakhiraj* tenure could not be determined, the question being of disputed boundary in fact.

*Gobind Chunder Mookerjee, contra.*—My clients are purchasers at a sale for arrears of revenue. The defendants are the former talookdars who were sold out. On measurement we found the disputed

In a suit for possession and mesne profits which defendants put forward a claim to hold as *lakhiraj*; Held that the principal sudder ameen omitted to try the real issue, which was whether the land belonged to one tenure or to the other, and not whether or not the plaintiff had a right to assess, the possession remaining with defendants.

lands, which are rent-paying, in their possession, and sued them under Regulation VII. for rent. They claimed the land as *lakhiraj*, and our claim was dismissed. We then sued for resumption under Regulation III. of 1819, before the collector. Their claim as *lakhirajdars* was rejected by that officer and judgment was given in our favor. An appeal was preferred to the judge, who, on the ground of our neglecting to file our reply before the collector within six weeks, struck the case off his own file.

We again brought a civil action in the zillah court,—that now before the Court in appeal. We prayed, with reference to the previous papers, possession might be given, and sued the defendants, talookdars, and those who held under them, and claimed *wasilat* also.

#### JUDGMENT.

SIR R. BARLOW AND MR. R. H. MYTTON.—We observe that an issue was drawn on the question of *mal* and *lakhiraj* under Section X. Regulation XXVI. of 1814, and the principal sudder ameen has determined the plaintiffs' right to resume only, though the prayer of the plaint is for *possession* and *mesne profits*, not for resumption; a wrong issue was therefore drawn. The reference to the collector and his report are in consequence inoperative. The case is, in fact, one of disputed boundary, which needed no reference to revenue authority.

The real point at issue between the parties has not been tried, and a remand is therefore necessary.

The principal sudder ameen will draw a fresh issue, and determine whether the disputed land belongs to Neej Ichapore, as claimed by the plaintiffs, or to their separate tenure, as stated by defendants. The principal sudder ameen's decision is reversed.

MR. W. B. JACKSON.—I agree in the proposed order reversing the decision of the principal sudder ameen, and directing him to try the case on the issue whether the land in question belongs to the zemindaree of plaintiffs or to the *lakhiraj* tenure of defendants. In the trial of this case the principal sudder ameen is not to take up or decide on the validity of the tenure of the defendants; but simply whether the land in question is part of that tenure, or of the zemindaree.

THE 14TH DECEMBER 1852.

PRESENT:

J. R. COLVIN, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION NO. 547 OF 1852.

IN the matter of the petition of Ramkaunth Holdar, filed in this Court on the 18th August 1852, praying for the admission of a special appeal from the decision of Moulvee Mahomed Saem Khan, principal sudder ameen of 24-Pergunnahs, dated the 27th May 1852, reversing that of Baboo Jugunnath Persaud Banerjea, moonsiff of Bishenpore, dated the 27th June 1851, in the case of Hulodhur Ghose, plaintiff, *versus* Ramkaunth Holdar, defendant.

Remand on application of special appeal, the decision of the lower appellate court not meeting the requirements of Act XII of 1843.

It is hereby certified, that the said application is granted on the following grounds:

This is a suit on bond for rupees 52-8-16. The defendant denied the bond altogether, and urged that the action was brought from motives of enmity.

The moonsiff dismissed the claim. He assigned various reasons for doubting the reality of the transaction and the credibility of the evidence to the execution of the bond, and dwelt on the improbability of the defendant borrowing money from the plaintiff on account of the obvious enmity between the parties, in regard to which he cited a number of proceedings in different courts.

The principal sudder ameen, on appeal of the plaintiff, decreed the claim. He merely remarked in his judgment very generally that the claim was proved, and that the arguments of the moonsiff were *beside* this case. Further he observed, that the objections of the appellant were good, but omitted to notice the *nature* of the objections, or the *grounds* on which he considered them to be good.

The admission for the application of a special appeal is, on the ground that the decision of the principal sudder ameen does not meet the requirements of Act XII. of 1843.

We are of opinion that the decision of the principal sudder ameen is essentially defective with reference to the provisions of the above law. He should have met the reasoning of the moonsiff, and stated in distinct detail all his grounds for reversing it. We must notice with censure a decision so brief and unsatisfactory, especially as it was passed after the issuing of the Circular Order, November 14th of 1851. We therefore admit the special appeal, and reversing the decision of the principal sudder ameen, remand the case to him, in order that he may pass a fresh decision with regard to the above remarks.

THE 14TH DECEMBER 1852.

PRESENT:

J. R. COLVIN, Esq., *Judge.*

A. J. M. MILLS, Esq., *Officiating Judge.*

PETITION NO. 567 OF 1852.

Remand as above, a koork-sezawul being by virtue of his office competent to receive rents and grant receipts; the case was returned for decision as to the genuineness of a receipt alleged to have been granted by one.

In the matter of the petition of Sadutoollah Mundul, filed in this Court on the 19th August 1852, praying for the admission of a special appeal from the decision of Moulvee Mahomed Saem Khan, principal sudder ameen of 24-Pergunnahs, dated the 18th May 1852, affirming that of Mr. H. S. Thomson, sudder ameen of that district, dated the 13th December 1850, in the case of Mirtoonjoy Bose, plaintiff, *versus* Sadutoollah Mundul, defendant.

It is hereby certified, that the said application is granted on the following grounds:

This a claim for balance of revenue on a jote jumma held by the defendant.

The plaintiff stated in his plaint that he had appointed a koork-sezawul to attach the tenure, and he distrained the crop of the defendant; on which he, defendant, having contested the distraint, it was removed by the collector on account of some informality in the serving of notice. The moonsiff decreed the claim: he pronounced the receipt for the rent claimed, produced by the defendant as having been given by the sezawul, to be fabricated.

The principal sudder ameen affirmed the judgment of the lower court. He was of opinion, that there were no *prima facie* grounds for impugning the receipt, but rested his judgment on the argument that no such receipt could be of any validity without proof of a special authority from the plaintiff to the koork-sezawul to receive money on his account.

We observe that the payment to a koork-tehsildar, deputed by the zemindar to attach a ryot's tenure, is a payment to the zemindar himself. By virtue of his office, the koork-sezawul is competent to receive rents and grant receipts; and the principal sudder ameen's judgment is therefore founded on an obviously erroneous principle. The issue for adjudication is whether the receipt relied on is a false one or not; and the principal sudder ameen has not given an express opinion upon that point. We therefore reverse the decision of the principal sudder ameen, and remand the case to him, in order that he may pass a fresh decision with reference to the foregoing remarks.

THE 14TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 210 OF 1851.

*Regular Appeal from the decision of Moulvee Moazzum Hossein Khan, Principal Sudder Ameen of Bhaugulpore, dated 9th September 1850.*

MUSST. BHOLAMOTEE AND OTHERS, (PLAINTIFFS,)  
APPELLANTS,

*versus*

ABDOOLLAH KHAN AND OTHERS, (DEFENDANTS,)  
RESPONDENTS.

*Vakeel of Appellants—Kishen Kishore Ghose.*

*Vakeels of Respondents—Ameer Alee and J. G. Waller.*

SUIT laid at rupees 9,991-8-6-8, for possession of the village of Muheshpore by the reversal of the sale of it.

*Baboo Kishen Kishore Ghose* for appellants.—On the facts whether Kaleepersaud became a convert to the Mussulman religion, and whether Sheodlal was a minor at the time of the executing the kubala, and whether the two kubalas are therefore void, and a decision should pass in favor of plaintiffs.

The principal sudder ameen goes on the facts, and considers them not established, he does not go on the law.

Kaleepersaud's kubala is dated 8th March 1842 (26th Phagoon 1249 F). It is to be considered whether he had become a Mussulman at that time. We assert that he was converted in 1248 F. or one year before; that he was converted there is no doubt, because he calls himself Mohubbut Alee in his answer; and that the conversion was in 1248 F. The principal sudder ameen says otherwise, but this is opposed to defendants' own admission. As to the effect of this conversion on the kubala, there are precedents to the effect that a Hindoo by becoming a Mussulman loses all his property.—Cites precedent, page 7, March 1814, and Macnaghten's Hindoo Law, volume II. page 131. As to Act XXI. of 1850, this applies only to subsequent conversions. This suit was brought 13th January 1849, and Act XXI. of 1850 does not apply. He says he left the Hindoo religion from regard for a woman.

A plea that a kubala was void because the party who executed it had left the Hindoo for the Mussulman religion thrown out, under Act XXI. of 1850.

A plea of minority to invalidate a kubala also rejected on the ground of want of evidence.

*The Court* are of opinion, that if there was any law or usage among the Hindoos, which affected the right of Kaleepersaud to dispose of his property by sale by reason of his having become a Mussulman, such law or usage cannot be enforced or acknowledged in this Court, with reference to the provisions of Act XXI. of 1850, and that this law has a retrospective effect, and reaches conversion which took place before as well as after the passing of this law.

*Mr. J. G. Waller* requests that a note may be taken, that he denies the existence of any Hindoo law or usage, which would have the effect of rendering the sale invalid by reason of the seller's conversion, even if Act XXI. of 1850 had not been passed.

*Baboo Kishen Kishore Ghose* proceeds—As regards the kubala of Sheodial, it is dated 7th April 1842, (12th Cheyt 1249 F).

The principal sudder ameen says the evidence to his minority at that time is contradictory, and rejects the junnum putr; denies that the witnesses say that Sheodial was born in 1233 F.; they all say 1235 F. The register took a separate deposition of Sheodial, which is an unusual and suspicious proceeding.—Reads a proceeding, 14th September 1841, or 30th Bhadoon 1248 F., of the judge of Bhaugulpore, in which Sheodial is called a minor.

This is six months before the date of the kubala. It is not regular to have witnesses to a junnum putr.—Reads evidence to the fact that Sheodial was born in 1235 F.

*Mr. J. G. Waller*, on the part of respondents, answers.

#### JUDGMENT.

The execution of the two kubalas, to avoid which the suit is brought, is admitted; but their validity is denied;—that of Kaleepersaud, on account of his conversion from the Hindoo to the Mussulman religion. On this point the Court have already declared that the fact does not invalidate this kubala. The kubala of Sheodial is impugned on the ground of his minority at the time of execution; but in opposition to the direct evidence of the plaintiffs' witnesses to the date of Sheodial's birth, there are the facts that he declared himself twenty-three years of age at the time of registry, and the evidence of witnesses then present; also that he was sued on a bond, and a decree given and executed against him before the date of the kubala. The petition given in, objecting to this decree, on the score of his minority, was not followed up by further proceedings; and the decree must therefore be considered good evidence of the majority of the defendant. We consider that no sufficient evidence has been brought to prove that he was a minor on that date; and the deed is therefore valid. We see no reason to interfere with the decision; costs against appellants.

THE 15TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*  
R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 284 OF 1851.

*Regular Appeal from the decision of Moulvee Mahomed Ruffq Khan, Officiating Principal Sudder Ameen of Behar, dated 26th April 1851.*

MUHA RANEE INDERJEET COOER, (DEFENDANT,)  
APPELLANT,

*versus*

BABOO MODNARAIN SINGH, (PLAINTIFF,) RESPONDENT.

*Vakeels of Appellant—Ameer Alee and Ramapersaud Roy.*

*Vakeels of Respondent—J. G. Waller and Kishen Kishore Ghose.*

SUIT for possession of mouza Sherpore, pergunnah Sunowut, valued at rupees 7,138-1-10.

This suit was instituted by plaintiff as zemindar to recover possession of mouza Sherpore, with mesne profits from 1249 to 1255, by reversal of the magistrate's award, under Act IV. of 1840, to the defendant, whose claim is under an alleged mookururee grant from the father of the plaintiff. The plaintiff admits that there is a mookururee tenure of the mouza, but that it was granted to his late mother. The defendant in answer pleaded the mookururee grant to her; but the principal sudder ameen, on comparing the signature and seal on the pottah with those on other documents in Court, signed and sealed by the alleged grantor, pronounced the former to be a forgery, as also some dakhilas filed in support of the defence, and decreed in favor of the plaintiff.

From this decision the defendant appeals, and proposes the following issues:—

*Issues on behalf of the Appellant.*

*First*,—The revenue of the mouza sued for being paid in conjunction with that of a lot, and the plaintiff nevertheless laying the suit at three times the amount of its sudder jumma, is not this wrong and illegal?

*Secondly*,—The plaintiff suing upon allegation of the disputed mouza being a mookururee tenure of his mother, is not the onus of proving the same with the plaintiff?—and is not the principal sudder ameen's decision defective and incomplete in consequence of his not recording an issue on the foregoing point, and trying the point in question?

An objection to valuation, whether as to amount or principle of valuation, not taken in the lower court cannot be heard in appeal.

A court cannot accept or examine a document not bearing the proper stamp; a defence founded on such a document must necessarily fail.

*Thirdly*,—Is the manner in which the principal sudder ameen has rejected the *pottah* in the name of the appellant, right with reference to the papers on the file, and ought the appellant's *mookhuree* tenure to be annulled with reference to law and equity?

*Fourthly*,—Is the principal sudder ameen's decision, which is passed without an investigation of the point respecting possession and ascertainment of the amount of *wasilat*, right and equitable, and is the plaintiff's claim of the *wasilat* just and proper?

*Fifthly*,—The principal sudder ameen has decided this case, *not* with reference to the circumstances under which the plaintiff instituted his claim, *but* on consideration of the defendant's pleas being good and valid. ~~Is~~ not such an act of the said judicial officer contrary to the rules of the courts of justice; and does it not render his decision defective?

With reference to the first plea, the Court inquires from the pleaders for respondent from what sources the plaintiff obtained information on which he estimates the sudder jumma of the mouza at rupees 518-6-5.

*Baboo Kishen Kishore Ghose* replies—That in Behar each mouza in an estate bears a separate jumma in the records of the collectorate, and those records are his client's source of information.

The Court proceeds to hear argument on the point:

*Mr. Waller*, for respondent, objects to the issue.—This is a point of form, and the objection of valuation has not been taken in the lower court, and according to practice cannot now be heard. It is a point which should be taken once, and in the form of demurrer, and after the order on it a separate summary or regular appeal can be had. Not having taken it at the proper time, he must be considered to have waived it. The Circular Order of this Court of 20th August 1841, paragraph 3, is conclusive against such an issue being now taken.

There is a full bench decision to the same effect of 17th December 1846, and published among the Select Reports.

*Baboo Kishen Kishore Ghose* on the same side, quotes Section IV. Regulation XIII. of 1808, as requiring that such an objection should be taken *in limine* and showing that it cannot be admitted afterwards.

*Moonshee Ameer Alee* admits the general principle contended for, but argues that the objection is not to the valuation, but to the mode of valuation adopted. This suit should have been valued according to the selling price.

On the 27th November 1851, in a suit in this Court, an objection was taken in this Court, that part of the claim was not properly valued; and on that objection the case was remanded. Paragraph 3 of the Circular Order, quoted by the respondent, does not apply; that paragraph refers to valuations under Clause 4 of note to

Article 8, Schedule B. Regulation X. of 1829. Para 2 of the same Circular Order is that which applies to this question.

BY THE COURT:—SIR R. BARLOW.—No objection was taken to the valuation in the lower court: no preliminary investigation could therefore take place on that point or summary order be passed on it; and the provisions of Section IV. Regulation XIII. of 1808 bar the hearing of it; but I think it is necessary, as the point has been raised by the argument before us, that the plaintiff, having alleged a separate jumma was paid to the collectorate for the disputed property, though it formed a part of an entire estate, and this fact not having been denied in answer, to state that in my opinion the suit is properly laid. Article 8, Regulation X. of 1829, Schedule B., 1 p. declares that in suits for land paying revenue to Government, if forming one entire mehal, or a specific portion thereof with a defined jumma, the value shall be assumed in ceded and conquered provinces of Cuttack, at the amount of the annual jumma payable to Government on account of the mehal or portion thereof, as aforesaid, and where the land has been assessed in perpetuity, at three times the amount of the annual jumma. The plaintiff has, with reference to the above law, done all that was required, and the suit has been rightly instituted.

MR. W. B. JACKSON.—I agree with my colleagues that the question as to the correct valuation of the suit cannot be raised in an appeal court.

The law requires that such objections shall be raised in the court of first instance, and allows a summary appeal on this point. The Circular Order of August 1841 appears to me erroneous on this head. The objection in this instance is based on a point of law as well as a point of fact; but on neither can it be heard, because it was not raised in the answer to the plaint.

MR. R. H. MYTTON.—This issue cannot, in my opinion, now be heard. In the case quoted by the appellant's pleader as a precedent, it does not appear that it was argued that such an objection cannot be taken, for the first time, in the appellate court. Although therefore the court acted as if it could, the order of the court is not of much force in ruling this particular question. The appellant's vakeel relies upon para. 2 of the

"When the error in the value of the stamp in the original suit may be discovered in appeal, the appellate court, if the more indulgent process is determined on, shall return the plaint and the decree, retaining the case on the file, to the lower tribunal, for the purpose of having a duplicate plaint filed, and the necessary alteration made in the costs; and, on the return of the document, shall then proceed to dispose of the appeal on its merits."

Circular Order of 20th August 1841, quoted in the margin, as showing that the appellate court may take up an objection to the valuation not brought forward in the original court. The use of the word *discovered* in this paragraph, certainly, *primâ facie*, leads to such a conclusion, but on looking to the law on which it is

founded, i. e., Regulation XXVI. of 1814, Section VII. Clause 2,

it will be seen that Clause 1, Section IV. Regulation XIII. of 1808, which declares that an objection to valuation *shall not be received unless offered in the first instance* in answer to the plaint, is not overriden by the later law, Regulation XXVI. of 1814. The wording of the Circular Order should more properly have been "when the appellate court holds that there has been an error in valuation, &c."

It has been contended that Clause 1, Section IV. Regulation XIII. of 1808 only refers to objections to amount, and not to the principle of valuation; but the principle, which should guide the court on objections of the last class, is the same as on those of the former. Indeed, if it is not an objection to the amount of valuation that is taken, it is no objection at all. There are two decisions on this point, viz. *Lutchmee Narain versus Newal Kishore*, 24th July 1851, *Soodorson Hoba*, petitioner, 13th November 1851.

To the second issue, *Mr. Waller* also objects. He submits.—The question all along has been whether the defendant has or has not a mookururee tenure? The defendant went to trial in the lower court on this issue, and the allegation of plaintiff that his mother had a mookururee is a mere explanation of something which occurred in the Act IV. case. The pleadings in no way raise the question, whether the plaintiff has a mookururee.

*Baboo Ramapersaud Roy, contra.*—The issue taken does arise on the pleadings. This is not a suit of an ordinary case for a zemindar against a tenant, but of a brother against the widow of another brother. Both admit that in the deed of partition this mouza is entered as a mookururee.

The Court view the plaint as that of a zemindar, and decide that this issue does not arise from the pleadings.

With reference to the issue proposed by the respondent, objecting to the reception of the defendant's (appellant's) mookururee pottah and receipts as not having been stamped before the answer was put in—

*Mr. J. G. Waller* for respondent.—The defence was filed 6th June 1848, in which the pottah and receipts were pleaded, and the application for affixing of stamp was not made till January 1849. By the precedents of the Court, documents not bearing the proper stamp cannot be pleaded. The case of *Bepun Beharee Ghose versus Bishumber Bidyabhoosan*, decided on 21st January, is strictly in point. In the case of *Raja Sajee Loll*, decided 29th November 1852, it was contended that, although the title deeds did not bear the proper stamp when pleaded, other proof was producible; but the Court ruled that the document on which the party mainly relied, not being properly stamped, was fatal to his case.

*Moonshee Ameer Alee* in answer.—There are other proofs on the record to support my client's claim to mookururee. Her case does not necessarily fall for the defect of stamp on the pottah;—see the

precedent of this Court, 28th July 1852, in the case of Mouzzam Alee Khan.

It is not necessary that the receipts should bear a stamp by Schedule A. Article 45. Regulation X. of 1829, as they are not above rupees 50

*Baboo Ramapersaud Roy*, on the same side, admits that the pottah cannot be received by the Court, but that he is prepared to argue the case on its merits, irrespective of the pottah, taking the risk of being debarred from future action thereby.

#### JUDGMENT.

SIR R. BARLOW.—It is clear to me that the intent of the defendant, as shown by her answer, was to rest her claim on the mookururee pottah. This was not held to be proved by the principal sudder ameen; and the defendant in appeal has urged, in reply to respondent's objection to the admission of that deed, as it was stamped after the answer was filed, that no stamp was necessary; at all events, that this case should be tried on its merits, irrespective of the pottah, if it be thrown out as inadmissible by the Court. The pottah cannot, under numerous precedents of the Court, be received. The defence is founded mainly on it. The answer does not fairly put to issue the fact of existence of other proof than the said pottah, though it mentions the evidence of witnesses, and a deed of division in its support. To allow the appellant to withdraw in appeal her chief document, which however has been thrown out by the lower court, and to permit her to proceed on pleas raised and now put forward prominently in appeal as the ground of action, when they were merely incidentally introduced in the answer in support of the plea of a mookururee tenure, is contrary to practice and cannot be sanctioned. The issue between the litigants was, on the part of the plaintiff, his zemindaree right, on that of the defendant, her mookururee right. The principal sudder ameen disallows the latter. I see no reason to interfere with that decision. I would dismiss the appeal with costs.

MR. R. H. MYRTON.—The Court has repeatedly ruled that under the terms of Regulation X. of 1829, it cannot look at a document pleaded before it was impressed with the proper stamp: consequently they cannot admit the pottah of the appellant. They have perused the defence, and I find that it rests entirely on the said pottah. The plaintiff comes in under a general right as zemindar to obtain possession of a village, which he asserts was given possession of to the defendant by the magistrate on a false and fraudulent claim to mookururee. The only title which the defendant puts forward to debar him obtaining possession, is the pottah in question. The receipts, even if genuine, would be merely proofs of possession, but the plaintiff asserts that the possession is wrongful.

I am of opinion that the appeal cannot be supported, and consequently concur in dismissing it with costs.

MR. W. B. JACKSON.—I admit that the mookurree lease cannot be received in evidence, as it is not properly stamped; but I see no reason why the case should not go to trial on other evidence, filed in support of the mookurree title. If there were a distinct admission on the part of the plaintiff of the mookurree title, or some decree of Court recording that title as good, the defendant could prove her right, although the lease were wanting. I think that the case should therefore be tried on the other evidence. Whether there is any other sufficient evidence to prove defendant's right, I do not give an opinion, for the issue has not been tried, and the counsel has not been allowed to show what is the nature of that evidence. I dissent, however, from the judgment of my colleagues, which rejects the plea of a mookurree title without hearing the evidence in the case in support of that title.

THE 15TH DECEMBER 1852.

PRESENT:

J. R. COLVIN, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION No. 585 OF 1852.

Order of remand on application for special appeal for consideration as to applicability of a particular precedent.

In the matter of the petition of Gourram Dhobee and Bejoyram Dhobee, filed in this Court on the 27th August 1852, praying for the admission of a special appeal from the decision of Captain George Butler, superintendent of Cachar, dated the 14th April 1852, affirming that of Kasheenath Dutt, sudder moonsiff of that district, dated the 30th December 1851, in the case of Neelkaunt Surma, plaintiff, *versus* Gourram Dhobee and Bejoyram Dhobee, defendants.

It is hereby certified, that the said application is granted on the following grounds:

This suit was laid at rupees 66, for possession of 2 paos, 3 jeyts, and 2 rutees of land, valued at rupees 60, and ground rent for four houses built on it for one year, at 2 annas for each house per mensem, rupees 6,—total, rupees 66.

The sudder moonsiff adjudged possession of the land claimed to plaintiff; but as it could not be exactly ascertained who amongst the defendants lived on the land from Phagoon 1256 to Magh 1257, he awarded payment of rupees 2-8-6, on account of rent, being at the rate of 1 anna per mensem for each house, from the date of institution of suit to date of decree.

As three of the defendants only appealed, the superintendent of Cachar reversed the decision, declaring, upon the principle laid

down in the case of Syed Fakhrooddeen Hyder Khan *versus* Zobda Khanum, decided by this Court on the 20th of November 1851, that the appeal was irregular, because the appellants did not confine their appeal, or even state the extent of their individual shares, and did not bring in their co-sharers, co-defendants, as respondents.

We observe that the defendants pleaded that they and the other defendants were undefined co-sharers and co-partners in the property, and the rule laid down in the case of Tarneekaunt Lahoree and others *versus* Bhagurutte Debea and others, decided on the 7th of June 1852, page 463, which states that, where the point at issue in a suit, as regards the defendants, is identical, and turns on one ground of title, which is common to them all, it is competent to any of the co-defendants to appeal against the whole decree, would seemingly apply to them. We therefore reverse the decision of the superintendent of Cachar, and remand the case to him for a fresh decision, after full consideration of the applicability of the precedent above quoted to the case.

We remark, with reference to the second point in bar, as to the over-valuation of the land and rent decreed against the appellants, that the ruling of the lower appellate court is incorrect, and that that plea, though it may affirm a ground for proportionately reducing the amount of costs, cannot affect the hearing of the appeal.

THE 16TH DECEMBER 1852.

PRESENT:

W. B. JACKSON, Esq., }  
J. R. COLVIN, Esq., } Judges.

R. H. MYTTON, Esq., *Officiating Judge*.

CASE. No. 63 OF 1850.

*Special Appeal from the decision of the Acting Additional Judge of Chittagong, dated 20th July 1850, affirming a decree of the Additional Principal Sudder Ameen of that district, dated 11th December 1849.*

COLLECTOR OF CHITTAGONG AND ANOTHER,  
(DEFENDANTS,) APPELLANTS,

*versus*

OMEID ALEE AND ANOTHER, (PLAINTIFFS,) RESPONDENTS.

*Vakeel of Appellants—Ramapersaud Roy.*

*Vakeel of Respondents,—J. G. Waller.*

This case was admitted to special appeal on the 22nd January 1851, under the following certificate recorded by Sir R. Barlow and Mr. J. B. Colvin:

Held that the jaidad (receipt) given by turrufdars to

the revenue authorities in Chittagong, is a clear relinquishment of all claims and a final settlement of disputes as to the extent of the permanently settled lands of their estates.

(The particulars of this case are reported at page 498 of the Chittagong decisions of 20th July 1850.)

"The application is made on the following ground, that the plaintiffs, in adjustment of the disputes which had arisen between the Government and the turrufdars, having accepted the *towfeer* lands and given their receipt for the entire turruf with the *towfeer* lands, (the receipt is called in the Chittagong district "*jaidad*,") are barred from claiming the lands in suit.

"The judge on this point has said—'Had the jaidad on which the collector lays stress, contained a clause that the zemindars had no further claim on Government, it might have been considered a bar to the present suit. As it is worded, it is rather a receipt for papers and the estate Kumer Koolee; but does not appear to bar further claims, if such exist.'

"We have considered the document above referred to. It is signed by Deybee Dass, mookhtar for Omeid Alee and Choonee Bebee. The principal sudder ameen disallows this deed, which he says 'the plaintiffs deny, and the collector has brought forward no evidence to retort this statement.'

"The judge, however, is of opinion, 'that Deybee Dass was, no doubt, as shown by an exhibit of the Government pleader, the mookhtar of the plaintiffs, and authorised by them to sign all papers connected with the measurement.'

"We must therefore take this as a fact not to be contested in special appeal.

"Proceeding on these data, we give a translation of the said deed.

"'The decennial settled lands of the turruf, as per the former measurement papers, having been received, and having taken the *towfeer* lands from the Government *noabad* lands, we give this jaidad as a receipt to be in force when required.' Below is a specification of the quantity of land, all forming turruf Kumer Koolee, monza Chumbul.

"This appears to us to be a clear relinquishment of all claims, and a final settlement of disputes as to the extent of the permanently settled lands of the estate 'turruf Kumer Koolee'. The judge appears to us to be in error in considering the said jaidad to be 'a receipt for papers.' Indeed, the very great delay which has occurred in the institution of this suit, being eleven years, eleven months and thirteen days, of itself justifies the conclusion that the plaintiffs themselves were aware that it was a final adjustment. We therefore admit a special appeal to try this point first, i. e., the true construction and effect of the said jaidad.

"Should, however, on a hearing of the appeal before the full bench, the presiding judges entertain a different opinion, and doubt the correctness of the view we have taken of the purport and intent of the said deed, we submit a second point for trial as follows :

" If the jaidad be not a final adjustment, upon whom, with reference to Clause 2, Section XXXI. Regulation II. of 1819, does the *onus probandi* of showing what land was included in turruf Kumer Koolee at the period of the decennial settlement rest—whether on the plaintiffs or on the defendants, as ruled by the judge in the last clause of this decision, where he says—' I consider that the collector has altogether failed to prove that the land was unassessed and the property of Government at the time of the decennial settlement, and concurring in the view taken by the principal sudder ameen, I dismiss the appeal' " ?

**Baboo Ramapersaud Roy**—Reads the jaidad in question, with a view to prove that the present suit is barred by the terms of that document on the part of the plaintiffs. Contends that the document means the plaintiffs have received the whole of the lands in the estate (*turruf*;) as in former measurement, and the *towfeer* over and above what was included in the former measurement, and given a receipt for the same. Underneath is mentioned mouza Kumer Koolee d. 54,\* h. 3, c. 10, c. 2 quantity *turruf* land, 6-5-11-1 *noabad*, 60-9-7-2 total, by the order of council. Admits the land in question is not included in this specification of land; but is separate *noabad* land settled with Jafur Alea. On being asked, admits that the order of council referred to in the jaidad, is not filed with the record.

**Mr. Waller** for respondents.—The plaintiffs have a decree in two courts on the merits of the case. The Government now pleads that the suit is barred by the plaintiffs' own act in giving a certain receipt. The document must be construed as favorably as possibly to the party coming into court, *viz.*, the plaintiffs. There is nothing in the document conclusive against the plaintiffs. The defendants try to show constructively that the claim is barred by it; but the words must be taken strictly. If it was intended to bar a suit by the document, it was easy to say this in distinct words.

The decennial settlement lands of the *turruf* as per former measurement, are stated to have been received. It goes on to say that the *towfeer* lands have been received. The lands in question are claimed as *turruf* not as *towfeer*; admits this land in question was not included in the former measurement mentioned in the document. Points out that the judge has found the fact that " plaintiffs have proved possession for many years," and the decree confirms plaintiffs' possession. This shows that the suit was understood to be not for possession. Admits that the document is no bar.

**Baboo Ramapersaud Roy** in reply—Refers to the document. The specification of the lands of Kumer Koolee mentions the *turruf* as

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\* See page 101 Zillah Decisions.

per measurement of 1242 B. or 1197 Muggee, and the *noabad* is mentioned separately.

The Court asked Baboo Ramapersaud whether he was prepared to file the order of council referred to, and any other papers explanatory of the document. He said he could do so in ten days.

Mr. Waller objects to admissions of such documents. There is nothing to warrant a postponement of the decision.

The Court postpone the decision for a fortnight, to enable Baboo Ramapersaud to file the order in council referred to, and any other papers explanatory of the arrangement between the Government and the party who executed the documents in favor of Government.

16th December 1852.

*Baboo Ramapersaud Roy* files—

*First*,—A Report, 2nd September 1841, from Sudder Board to Government, on the settlement operations of zillah Chiittagong, containing instructions to the collector.

*Secondly*,—Orders of Government, 12th October 1841 on that Report, p. 9.

*Thirdly*,—Letter of Mr. Ricketts, with power of Sudder Board, dated 1st November 1841, to the collector, allowing one-eighth or one-fourth excess on the measured *turruf* land.

*Fourthly*,—From Government to Mr. H. Ricketts, dated 2nd December 1841, proposing to limit the *goonjaish* to one-eighth on the measurement of 1764.

*Fifthly*,—Order of Government, 21st December 1841, on the above. The surplus to be bestowed is not to exceed one-eighth.

*Sixthly*,—Letter of 3rd January 1842, sending the above to the collectors.

*Seventhly*,—Proceeding of collector, 3rd March 1842, laying down the principle of the arrangement between the Government and engaging party.

*Eighthly*,—A jaidad, dated 21st January 1846, signed by Omeid Alee and Musst. Choohee Bebee, by hand of Debee Dass Ghose, being a receipt for the *turruf* land and *noabad* land, under the order of council.

*Ninthly*,—P. 270, collector's settlement report, dated 10th July 1848, to show that 9106 jaidads were filed and understood.

Contents that the jaidad is a full quitance for the land to which the plaintiffs have a right under the settlement, and old measurement, and the order of council referring to the settlement.

Mr. Waller in answer.—The Court did not consider the receipt conclusive at the last sitting. The receipt is not a bar to a claim for *turruf* land over and above the land mentioned in the receipt. The issues were that the plaintiffs claimed as *turruf* land. Collector said that the land was *noabad* not *turruf*, and that a receipt had been given by plaintiffs for *this land* (admits this is doubtful on

consideration of the precise terms of the decision as recorded). The question is not as to the legality of such claims as this, but whether the receipt bars the claim.

#### JUDGMENT.

MESSRS. W. B. JACKSON AND R. H. MYTTON.—As the special appeal certificate restricts us to the consideration whether the terms of the (jaidad) receipt of the plaintiffs are such as to preclude the present claim, we do not take up the legal point whether such a claim would lie, even if no such receipt were filed. We find the receipt to amount to a full admission that the plaintiffs have recovered all the *turruf* lands included in their settlement of *turruf* Kumer Koolee, as well as certain *noabad* lands, and that no suit can be heard to any more lands of either of those descriptions on the part of the plaintiffs. The present suit is for some additional *turruf* lands; and the receipt is therefore a bar to the present suit. The expression used in the receipt that the lands have been received according to the order of council, has induced the Court to refer to the correspondence regarding the settlement, with a view to elucidate the meaning of these words, which are vague; and the result is, that the papers filed by the Government pleader show that the jaidad or receipt was intended to be a final settlement or adjustment of the plaintiffs' claim; and this reference therefore only renders it more plain that the jaidad was intended to be what it appears from internal evidence to be, viz., a receipt in full for the lands included in the plaintiffs' settlement of *turruf* Kumer Koolee. We would therefore reverse the decisions of the lower courts, and dismiss the plaintiffs' claim with costs.

MR. J. R. COLVIN.—I quite concur in the general tenor of the above opinion. With reference to the expression in the jaidad that the plaintiffs had received "the decennial settled lands of the *turruf* according to the former measurement papers," I find that the meaning of these latter words, which I have underlined, is made clear by the terms of the intimation on which the revenue authorities declared their readiness to accept a jaidad from the *turruf*dars of Chittagong, these having been to the effect that the Government admitted no right in them to anything beyond the quantity of land stated as included in the *turrufs* in the original measurement papers (of 1120 Muggee), and that all beyond which they were to be allowed to retain was to be regarded as a mere bounty or gratuitous concession (*bukshish*) from the Government. This makes it the more certain that the jaidad was well understood by the plaintiffs as constituting an acknowledgment that they had received the whole of their *turruf* lands, and could have no claim to anything more as belonging to their *turruf*. Indeed the portion of the *noabad* land received by them, they describe in express terms in the jaidad, as *towfeer* or excess.

THE 20TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } Judges.

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 202 OF 1851.

*Regular Appeal from the decision of Ram Lochun Ghose, Principal  
Sudder Ameen of Nuddea, dated 23rd August 1850.*

WOMESH CHUNDER ROY AND OTHERS, (PLAINTIFFS,)  
APPELLANTS,

*versus*

MOHINDERNATH CHATTERJEA AND OTHERS,  
(DEFENDANTS,) RESPONDENTS.

*Vakeels of Appellants—Ramapersaud Roy, J. G. Waller, Hurkali  
Ghose and Syed Murhummut Hossein.*

*Vakeels of Respondents—Kishen Kishore Ghose and Gobind  
Chunder Mookerjee.*

13th December 1852.

SUIT laid at rupees 9,971-6, being the value of indigo, &c.

It is not necessary that a party changing his pleader should present his petition to that effect in person.

Any party appointed a vakeel jointly with others, may, if he see reason, in the course of the suit, discharge that vakeel and appoint another, to represent himself in the case, but no new issues can be filed by him.

On the case being called up, one of the appellants, through Moulvee Looft-ool Ruhman, on the part of Poorun Chunder Roy, presented a petition, praying that he might be allowed to put in a separate issue and appoint another pleader in seven days, having withdrawn the vakalutnama he had given to other pleaders, viz. Baboo Ramapersaud and Mr. Waller.

SIR R. BARLOW AND W. B. JACKSON.—Upon reading the petition first put in on the 2nd December, we find that Poorun Chunder Roy appoints Looft-ool-Ruhman, his vakeel, to plead his cause, and though Clause 2, Section XII. Regulation XXVII. of 1814 enacts that the party is to present a petition to the Court, notifying that he has withdrawn the management of the suit from a pleader, and is to file a new vakalutnama, we hold that the omission of the mere form to present a preliminary petition, is not of such force as to nullify the powers vested in the new pleader. The word "*party*" may be construed to mean a party through his vakeel as well as *propria persona*.

MR. R. H. MYTTON.—It is urged against the reception of the application of Poorun Chunder Roy, that Clause 2, Section XII. Regulation XXVII. of 1814 requires that the party changing his vakeel, should present a petition in person, but it is admitted that the Court has never ruled to this effect, and there is nothing in the law excepting this step from the ordinary rule, that a petition may

be presented by an authorized agent. The petition of the 2nd December is, in my opinion, such a petition as is contemplated by the above-quoted law, inasmuch as it asks permission to withdraw the power granted by the petitioner to the former vakeels, and to appoint another (Lootf-ool-Ruhman) in their stead, and is accompanied by a vakalutnama to that vakeel to carry on the suit. I would overrule this objection and accede to the request contained "in the petition of the 2nd December."

The pleaders for the appellants further have to urge, that it is not competent for one of the appellants in this case, Poorun Chunder Roy, plaintiff jointly with others in the original suit, to withdraw the powers conferred on them by him and his two brothers. The Court have always held that a suit, commenced by plaintiffs jointly, must be likewise carried on by them jointly to its conclusion. The principle is a wholesome one and acted on in all courts. Great confusion would arise in the matter of costs, if a party were allowed to separate himself from his co-plaintiffs. It is necessary that every step in all stages of a case taken by plaintiffs conjointly, must be carried on jointly. Plaintiffs, however numerous, must be dealt with as though they were one, and they are in fact one. The fact of withdrawing the powers of certain pleaders and of appointing another by a plaintiff joined with others, is an act of separation, which the law and precedents do not sanction.

SIR R. BARLOW.—I am of opinion that parties coming in jointly as plaintiffs in the court of first instance and appealing jointly against the decision of that court must act together to the close of the case in appeal. The principle is recognized in the Court's decision of 16th June 1851. In the case of 14th June 1852, the same principle will be found; joint appellants had appeared. There was not in that case any repudiation of pleaders. I held that as the parties who were appellants jointly, did not carry on their appeal, but were in laches, therefore, that as the case could not be defunct and go on at the same time, and the whole case, in consequence of the absence of some parties, was not before the Court, the appeal must be thrown out. Clause 2, Section XII. Regulation XXVII. of 1814, admits the withdrawal of the power of a vakeel, and the appointment of another. The law cannot be restricted. The result of the course has to be considered.

MR. W. B. JACKSON.—I think that, under the terms of the law, any party having appointed a vakeel jointly with others, may, if he see reason, in the course of the suit, discharge that vakeel and appoint another to represent himself in the case. It remains to consider what will be the effect of this on the case, that is, in an appeal, in which all the three plaintiffs have joined hitherto, and which was ready for trial before the party in question appointed a separate vakeel.

MR. R. H. MYTTON.—I concur with Mr. Jackson.

Read a petition, dated 7th December, put in by Lootf-ool-Ruhman on part of Poorun Chunder Roy.

*Baboo Ramapersaud Roy and Mr. Waller* object to the petition being received and heard, as it is not the act of all the plaintiffs, appellants. Before reading, Mr. Waller argues the petition is not filed with the consent and concurrence of his clients, who have a joint interest with the petitioner in every stage of the case.

The Court are of opinion that there is no objection to hearing the petition and order it to be read.

It states that he with his two brothers, Womesh Chunder and Bhaghun Chunder, have appointed Mr. Waller and Baboos Ramapersaud Roy and Hurkali Ghose, pleaders on their part in the Case No. 202 in appeal before the Court: disputes have arisen in the family. The respondents are servants of Womesh Chunder, the elder brother. He has declared he will, by some means or other, make the case a bad one. I have determined to appoint a separate pleader and not to continue the pleaders first engaged. My mookhtar, Ram Jadob Sircar, made several mistakes in the vakalutnama he gave on the 2nd December, as also in the petition of that date, which is contrary to the mookhtarnama. I now apply that, in conformity with that mookhtarnama, my former pleaders be set aside, and in seven days, I will appoint another vakeel, and other issues.

*Mr. Waller.*—On the part of my clients, I give a most distinct denial of there being enmity between them and our co-plaintiff, Poorun Chunder, who appears through a new pleader. I also deny on the part of my clients that there is, or that there will be, any attempt to spoil the case. We are two plaintiffs and desire to carry on the case. Poorun, another plaintiff, wishes to postpone it. I furthermore urge, that proof of the allegations of the petition now put in should be called for, and I submit that the petitioner's conduct shows that he is colluding with the respondents to gain time and enable him to act in concert with them to our prejudice. The appeal was filed by all three plaintiffs in November 1850, and up to the 2nd of this month, December 1852, they have acted jointly. The whole case is complete for decision. The act of the petitioner is hostile to us. We are ready to go to a hearing.

The Court are of opinion that no new issues can be filed by the petitioner Poorun Chunder. The issues of the case were filed before his repudiation of the vakeels in concert with the other appellants, his two brothers, and he cannot now alter them. So much of the prayer is therefore rejected. But we see no objection, in order that we may have all the parties before us, more especially as there has been no such laches in the preparation of the case for hearing as would subject the petitioner to the penalties of neglect, to give the period of 7 days asked for by the petitioner to enable him to appoint a pleader for the purpose of carrying on his case.

On hearing his arguments, the Court will proceed to the determination of it in due course.

20th December 1852.

This case being brought forward, Poorun Chunder appeared through his vakeel, Murhummut Hossein, in supercession of those already engaged.

*Baboo Kishen Kishore Ghose* for the respondents, defendants, on their first issue.—The appellants in their plaint impugn the collector's conduct in giving a pottah to the defendants for five years, and claim the land as their Ramnugger given away as chur right of Government by the collector. The revenue commissioner, 14th June 1847, sets forth all the above objections by the plaintiffs made to the revenue authorities, and declares the Government or the collector is answerable for the year 1254, if any claim be preferred against the farm given for that year to Bhubun Mohun. The question for plaintiffs to prove was their right to the land as Ramnugger against the Government claim of newly-formed chur. The farmers, Bhubun Mohun and others, are in no way concerned with that question, but the Government has not been made a party to this suit, as was necessary. The judgment of the principal sudder ameen, therefore, on this point in dismissing the action against the defendants is good and valid. Defendants did not take forcible possession, but got farms from the Government after issue of notice for farm on 17th Magh 1253; plaintiffs did not appear, and Bhubun Mohun got it in that month. Plaintiffs have no engagement from the defendants, and can have no right of action against them.

*Baboo Ramapersaud Roy.*—My opponent has mistaken the case. The point is not a question for right of settlement and damages thereupon, but for damages by the act of the defendants under color of holding a farm from the collector. The acts are detailed in the plaint. The defendants brought an Act IV. case against us, also a summary suit, but failed in both. The ummulnama of the defendants is dated 26th May 1847, or 13th Jeyt 1254, nearly seven months after we commenced cultivation. The collector on receipt of the commissioner's roobukaree, referred to by respondents, issued an order to the ryots on plaintiffs' farm, ordering them to pay their rents to Bhubun Mohun for the year 1254, on the 22nd June 1847. Under the above circumstances there was no necessity for making the revenue officers of Government parties to the suit.

#### JUDGMENT.

SIR R. BARLOW.—The real issue in this case between the parties has not been tried by the principal sudder ameen.

Plaintiffs sue for damages of indigo crops which they themselves cultivated under a farm. The defendants put forward a lease granted to them by the collector for the year 1254. The principal sudder ameen denies that plaintiffs have any ground of action

against the defendants on the strength of the proceedings of the revenue officer to which he alludes, and on that account mainly dismisses the plaint, though he also states that plaintiffs were exonerated from a claim for rent brought against them by the defendants, on the ground that the latter held no engagement from them. The points to be tried are, as the record stands, whether the plaintiffs cultivated the lands and sowed the indigo and other crops alleged by them to have been destroyed by the defendants, and if the defendants did destroy them, what is the real amount of damage which should be awarded to plaintiffs? The Government authorized the farmer Bhobun to collect rents only from the ryots, and the acts charged against the defendants have no connexion with Government responsibility. These and any other issues, which in the course of the inquiry may arise in the mind of the principal sudder ameen, should be tried. The case is remanded to him for that purpose.

MR. W. B. JACKSON.—I agree in reversing the decision of the principal sudder ameen. The suit is for damages for destruction of crops, and the reasons assigned by the principal sudder ameen for declaring the defendants not liable are insufficient. The case must be tried over again on its merits: any new issues as regards liability to be included. It seems to me that if the plaintiffs cultivated lands during their own farm, they had a right to collect the crops from those lands, and if the defendants destroyed those crops, they would be liable for damages, unless they could prove the crops to belong to themselves. The main points for decision are these:—Did the right in the crops in question, at the time they were destroyed, rest in the plaintiffs, or in the defendants? If in the plaintiffs, the defendants are liable for damages if they destroyed them.

MR. R. H. MYTTON.—I concur in the above opinion, and in the order of remand.

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THE 20TH DECEMBER 1852.

PRESENT:

J. DUNBAR, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION NO. 577 OF 1852.

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Order of remand on application of special appeal with reference to a precedent cited.

IN the matter of the petition of Achumbit Singh, filed in this Court on the 24th August 1852, praying for the admission of a special appeal from the decision of Mr. W. St. Quintin, additional judge of Tirhoot, under date the 22nd May 1852, affirming that of Moulvee Abool Rekab, moonsiff of Durbhanga, under date the 25th May 1850, in the case of Mohunt Gungaram, plaintiff, *versus* Achumbit Singh, defendant.

It is hereby certified, that the said application is granted on the following grounds:

This case will be found reported at page 213 of the decisions for Zillah Tirhoot in May 1852. It was decided by the additional Judge on the 22nd May 1852.

This transaction appears to us to be one of the nature of a usufructuary mortgage, inasmuch as it is clear that the plaintiff has all along held possession of the property and enjoyed the usufruct. The defendant denies that any balance is due, and demands that an account of the collections made by the mortgagee in usufructuary possession, should be called for by the Court, according to the rule laid down in Section III. Regulation I. of 1798, and Section XI. Regulation XV. of 1793. The judge holds that his claim is barred because he did not lodge the purchase-money in court, but, under the decisions of this Court (see the case of Zynut Begum, 12th September 1849), it has been ruled that in such cases the mortgager, if he deny that any balance is due, can demand the rendering of accounts by the mortgagee in possession, without deposit, at any time previous to the final foreclosure, that is to say, previous to an award of Court, foreclosing the mortgage on a regular suit, though he would be liable to lose his suit, if, on examination of accounts, a deficit of even the smallest amount should be found due.

We therefore reverse the decisions of both the lower courts, and remand the case to the moonsiff with instructions to call for the accounts and the gross receipts of the property mortgaged, and pass a fresh decision according to law.

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THE 20TH DECEMBER 1852.

PRESENT :

J. DUNBAR, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION No. 583 OF 1852.

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In the matter of the petition of Musst. Huromonee Dassea and others, filed in this Court on the 26th August 1852, praying for the admission of a special appeal from the decision of Mr. C. T. Davidson, judge of Dacca, under date the 26th May 1852, affirming that of Moulvee Nazim Khan, principal sudder ameen of Furreedpore, under date the 12th December 1850, in the case of Goorpersaud Dutt and others, plaintiffs, *versus* Musst. Huromonee Dassea and others, defendants.

It is hereby certified, that the said application is granted on the following grounds:

The particulars of this case will be found at page 101 of the Zillah Dacca Decisions for the month of May 1852. It was for possession of an 8 annas share of a talook with mesne profits.

Remand as above, for lower appellate court to judge of applicability of a certain precedent, and to state grounds of refusal to admit a supplemental pleading.

The principal sudder ameen decreed the claim. One of the defendants only appealed; and the judge dismissed the appeal on two grounds:—

First,—That the appellant prayed for the reversal of the whole decree, and did not make the defendant, who did not join in the appeal, respondent.

Secondly,—That one of the plaintiffs in whose favor a decree was passed was not included among the respondents.

It is urged by the petitioner that, as regards the first point, the appeal is, under the rule declared in the appeal case of Tarneekaunt Lahome and others *versus* Bhaguruttee Debea, admissible; and that with reference to the second defect noticed by the judge, the petitioner filed a petition for leave to include the name of Panchomee Dassea amongst the respondents, and the judge rejected it, without assigning any reason for doing so.

The objections appear to us to be good. Under the precedent quoted above, if the point at issue, as regards the defendants, is identical and turns on one ground of title common to all, the Court may reverse the decree in favor of all the defendants, though not joining in the appeal; and this seems to be the case in the present suit. It will be therefore for the judge to determine whether the precedent is applicable or not. The judge should have certainly stated his reasons for refusing to admit a supplemental pleading as authorized by Clause 3, Section IX. Regulation XXVI. of 1814, for the purpose of supplying the alleged omission in the petition of appeal. We therefore admit the special appeal, and reversing the decision of the judge, return the case to him in order that he may pass a fresh decision with reference to the foregoing observations.

THE 20TH DECEMBER 1852.

PRESENT:

J. DUNBAR, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION NO. 584 OF 1852.

Remand as above, the lower appellate court having declined to take up an objection raised by the defendant.

IN the matter of the petition of Sheikh Noor Mahomed, filed in this Court on the 27th August 1852, praying for the admission of a special appeal from the decision of Tarakaunt Biddyasagur, principal sudder ameen of Cuttack, under date the 27th May 1852, confrming that of Sheebpersaud Singh, sudder moonsiff of that district, under date the 29th December 1851, in the case of Shah Mahomed, plaintiff, *versus* Sheikh Noor Mahomed, defendant.

It is hereby certified, that the said application is granted on the following grounds:

Dhuneé Bebee sued her brother, Sheikh Noor Mahomed, (the present petitioner), for her share of certain property left by their father, and obtained a decree. The plaintiff in the suit out of which this application arises, is the husband of the said Dhuneé Bebee (deceased). He brought the suit against Noor Mahomed for possession of kismut Battée Tunkee Shereghur, 4 annas, 13 gundas, 2 cowrees and 2 krants, setting forth in his plaint that after his wife had obtained the decree against her brother, she had made the property over to him by a Hibbanama or deed of gift, in virtue of which the collector had recognized him as proprietor, and registered his name as such, and that he had been obliged to come into court, because the defendant Noor Mahomed had subsequently unjustly ousted him from possession. The defendant denied the right of the plaintiff. The moonsiff decreed the claim, and his award was upheld by the principal sudder ameen.

It is urged that the principal sudder ameen refused to take up and dispose on its merits, of an objection raised by the defendant to the admission of the hibbanama, as being written on stamped paper of insufficient value. On referring to the decision of the principal sudder ameen, we find that he gets over the objection by stating on a variety of grounds, that the time was past for considering the admissibility or validity of the hibbanama, as the plaintiff had been in actual possession ever since the collector recorded his name up to 1249 B. S., at which time the defendant had not preferred any objection.

The principal sudder ameen was in error in declining to take up the objection raised by the defendant. The plaintiff had come into court and claimed possession on the strength of the hibbanama. He had put that document in issue. Its validity was not already established by the act of the collector. This was, in fact, the main point for the consideration of the court (should the objection as to the value of the stamp paper be got over). If the deed should be found good and valid, the plaintiff would be entitled to the whole of the property covered by it; if otherwise, he would only come in for a share as one of the heirs of Dhuneé Bebee.

We admit the special appeal, and reversing the decision of the principal sudder ameen, remand the case.

The principal sudder ameen will first consider the question of the admissibility of the deed with reference to the value of the stamp paper on which it is written; and if that be established, he will then proceed to dispose of the case upon its merits.

THE 21ST DECEMBER 1852.

PRESENT:

SIR. R. BARLOW, BART.,
W. B. JACKSON, ESQ., } Judges.

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 133 OF 1851.

*Regular Appeal from the decision of Moulvee Rooknooddeen, Principal
Sudder Ameen of Purnea, dated 21st December 1850.*

RAJARAM KOOWER, (PLAINTIFF,) APPELLANT,

versus

MAHARAJA ROODUR SINGH, (DEFENDANT,)
RESPONDENT.

Vakeel of Appellant—Sumbhoonath Pundit.

*Vakeels of Respondent—J. G. Waller, Ameer Alee and
R. Norris.*

The Court would not raise an objection not taken in the lower court, the decision of which in favor of defendant, based upon possession, was affirmed.

SUIT laid at rupees 13,063-4-9, for possession of lands with wasilat.

Upon view of the record, we observe that the plaintiff comes into Court by virtue of a putnee pottah of village Chowpohuree, talook Raghoopore, from Sreenarain Singh, the proprietor of a *nankar* mehal. The defendant, Maharaja Roodur Singh, claims the disputed land as belonging to his zemindaree, pergunnah Dhurumpore. Rajaram Koower, plaintiff, has not associated Sreenarain Singh with him, nor has he made him a defendant. With reference to former precedents, page 111, Sudder Dewanny Adawlut Decisions, 16th April 1850, and page 97, Decisions, 12th February 1852, and others, a question arises, whether in the absence of Sreenarain Singh, the proprietor of the *nankar* mehal, the case can go on by reason of defect of parties? The Court direct that this issue be first tried.

Mr. J. G. Waller, for defendant, respondent.—The plaintiff on plaintiff's own allegation is defective, and the Court is bound to notice the defect without any allegation of the parties. The Court will always prevent litigation, and unless the proprietor Sreenarain is a party to the suit, he may come in against the defendant at some future period.

The decision of April 1850, takes two points:—*first*, that a party having a derivative title may be injured by not having his principal brought forward; and *secondly*, the principal himself may be injured by not being before the Court. The whole object of the Court in every case is to close controversy. Is it in this case necessary to determine the rights of an absent party?

Certainly it is, and therefore his presence is requisite. The whole question of rights of parties is not before the Court, and be the absentee defendant or plaintiff, the principle is the same.

Baboo Sumbhoonath Pundit, for appellant, in reply.—This very objection was taken by the respondent in another case, see pages 22-23 *Sudder Dewanny Adawlut Decisions*, 15th January 1852. The decision in this case would be final as against my zemindar; and though in the case I quote, the Court did not determine the point, the absence of the proprietor in that case, still they intimated that no previous decision had ruled, whether such absence was fatal or otherwise. The precedent of 16th April 1850, quoted by respondent, does not apply, for the point therein decided was that the zemindar of the *defendant*, who held an under-tenure, not however putnee, not having been made a party, there was a defect of parties. I brought the action against those by whom I was dispossessed.

Mr. J. G. Waller.—The comprehensive issue in the case quoted by appellant, was the defect of boundaries which precluded the Court going further into the case, and therefore nonsuited the plaintiff. The question raised, *proprio motu*, by the Court, was not decided at all or even tried. The judgment in this decree cannot affect Sreenarain Singh. He is neither plaintiff nor defendant, nor even summoned as a witness to prove the putnee pottah he gave. I deny his pottah; and even if it be good, I deny the power of Sreenarain to give a tenure of the lands in dispute, which are in my zemindaree, not the proprietary right of Sreenarain.

SIR R. BARLOW.—In my judgment there is clearly a defect of parties in this case. All parties necessary to the determination of an action must be in court. The plaintiff, holding a derivative title under a proprietor, seeks to get possession, by virtue of a putnee tenure from him, of lands which the defendant claims as his separate zemindaree. The real question at issue is between the zemindars, principals, whose rights are most deeply concerned. The party, however, Sreenarain, from whom plaintiff alleges he holds, does not lay claim to any proprietary right, nor does he appear at all in the case. No decision between the parties before us would be complete, for we have not parties enough for a decree, such as would stop further litigation. The Court's judgment at page 111, *Sudder Dewanny Adawlut Decisions*, 16th April 1850, is, it appears to me, equally applicable to the case of absence of the proprietor from whom the plaintiff derives his title, as to that of the defendant's principal, as laid down in that case. The decision of the 15th January 1852 does not rule the point now raised, but the principle which governs the decision of April 16th 1850 is of equal force in both cases. I would, for the above reasons, pass an order of nonsuit. The question is one of which the Court must take cognizance, without its being urged in the pleadings.

MR. W. B. JACKSON.—The issue raised by the majority of this Court in this case, is whether the zemindar from whom the plaintiff derives his putnee tenure, ought not to have been made a party to the suit. The suit is on the part of a holder of a putnee tenure, including several villages, alleging that the defendant has dispossessed him of certain specified lands, forming part of one of those villages. The defendant denies that the lands in question belong to that village. He does not deny the validity of the plaintiff's putnee tenure, but denies that these lands form part of that tenure. It is not necessary, therefore, in my opinion, that the plaintiff should make his lessor a party. The point at issue is, whether the lands are included in the villages in question; and I see no reason why the lessor should be dragged into court, when there is apparently no point at issue between him and the plaintiff. I do not say the decision in this case would be final against the zemindar who is not a party, but it would be *prima facie* evidence, and very strong evidence, against any claim he might subsequently bring to this land as part of the same village: indeed, it would be conclusive evidence except on allegation of fraud; for while the putnee tenure holds good, the zemindar could not sue himself for the lands in question, as he, the zemindar, has divested himself of a right to the land in perpetuity by giving a putnee lease: it follows that the putneedar can sue, and the Court can determine on the putneedar's suit. If it be argued that the zemindar ought to be made a party, because the assets, on which his putnee rent is calculated, are affected, the same reasoning would make it appear that the Government should be made a party whenever there is a dispute between two zemindars, for the assets, on which the Government revenue are calculated, are thereby affected. These arguments occur to me, if the question be tried, whether the plaintiff should have made his own zemindar a party, but I agree with Mr. Mytton, that the defendant not having raised this objection in the lower court, the Court cannot now raise it; and I would try the case as it stands.

MR. R. H. MYTTON.—The pleader for the respondent has quoted no case in which this Court has rejected a suit in appeal, on the ground that the lessor of the plaintiff has not been made a party to it.

The only effect which the omission can have upon the defendant, (respondent,) is to make him liable to a second suit by the lessor, in case of the failure of that by the lessee.

The defendant made no objection to answer the suit of the lessee, but went to trial without raising the plea, that the suit could not be tried in his absence.

Macpherson, at page 328, has justly observed, that "a cause ought not to be decided in favor of a party, upon a plea not put forward by the party himself. If a defendant by his answer, either express-

ly or virtually, adopts as right, or waives his objections to, some position which he might have contested, and takes issue upon a different point; then, since the plaintiff has not had an opportunity of contesting the matter so put out of controversy by the defendant, it is unjust to decide in favor of the defendant because of the matter so waived." The lower court was not called upon to throw out this suit by the defendant for defect of parties, and therefore would not have been justified in so doing.

I am of opinion that the appellant should not be denied a hearing of his cause, on the ground urged by the pleader for the respondent, as he must be considered to have waived it, by neglecting to plead it in his answer to the suit. I pass no opinion on the question, whether such an objection to the suit as brought by a putnee-dar would have been valid, even if put forward at that stage.

Appellant's pleader proceeds on the merits of the case, and argues—That the principal sudder ameen does not rely on the local ameen's report, but upon the fact that the defendant is in possession. At the same time he states that the plaintiff's boundaries in his plan and plaint are at variance, but he does not point out wherein they differ; nor does he declare whether the local ameen's report and plan is in plaintiff's favor or otherwise. The decision of the lower court is moreover not sufficiently clear and explicit. It is true the plan and the evidence adduced by the plaintiff were on the record before the application for permission to file a supplement to correct the errors in the boundaries as laid in the plaint, but we are entitled to a decision as to rejection or otherwise of the supplemental petition. We applied a second time for a decision on this point: it was rejected on the ground, that the plaint and plans of both parties were already filed. At all events, if the supplement was not taken, it should not be allowed to operate against my client's interests. The case should have been decided on the proofs and pleas before the principal sudder ameen.

The variation in the boundaries laid in the plaint and those in our plan, could only subject us to nonsuit, not to dismissal of our claim.

Mr. J. G. Waller, contra.—The order of the Court may be good, though the reasons may not be recorded so fully as perhaps might be done. If the whole decision of the principal sudder ameen be read, it will be seen that it reports every stage of the proceeding regularly. The fact of the plaintiff's plaint and his plan being at variance as to boundaries, is the strongest evidence against him. Such is the principal sudder ameen's decision. The pleadings of a party are the best evidence against him, and plaintiff admits that he has been out of possession for about eleven years, without taking any steps to assert his right. Here again is evidence against him. When the pleadings were completed, and plaintiff's witnesses had been examined, he applied to correct an error in his plaint. This

could never be allowed. A mere clerical error is one thing; correction of errors as to boundaries specified in a plaint, at that late stage, is contrary to practice. The principal sudder ameen held that the proofs of both parties to the suit were nearly balanced, and looking for something to preponderate on the one or the other side, he determined our possession for some years, at least from 1243, was a circumstance in our favor, and gave judgment accordingly.

Baboo Sumbhoonath Pundit, in reply, reiterates what he above urged.

JUDGMENT.

We see no reason to interfere with the lower court's judgment. The principal sudder ameen has tried the case on its merits and on such proofs as were laid before him. He was of opinion that the evidence on both sides was equal, and that no preference could be given to the allegation of one party over that of the other. He however took the fact of long possession held by the defendants to preponderate in their favor. An attempt has been made to impugn the decision of the lower court, but nothing has been urged, which can affect the justice of the award. We dismiss the appeal with costs.

THE 21ST DECEMBER 1852.

PRESENT:

J. DUNBAR, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION No. 548 OF 1852.

Order of remand on application of special appeal, the lower appellate court in reversing the decision of the court of first instance having omitted to notice a particular point upon which much stress was laid in it.

In the matter of the petition of Abdool Aleé Soudagur, filed in this Court on the 18th August 1852, praying for the admission of a special appeal from the decision of Sreenath Biddyabagish, principal sudder ameen of Chittagong, under date the 13th May 1852, amending that of Nazirooddeen Mahomed, sudder moonsiff of that district, under date the 20th June 1851, in the case of Abdool Aleé Soudagur, plaintiff, *versus* Abdool Hossein and another, defendants.

It is hereby certified, that the said application is granted on the following grounds:

This suit was instituted for possession of a small portion of land, for which the defendant and others were admitted to settlement, as *dukhilkars*, by the revenue authorities. The moonsiff considered the plaintiff to have established his right and gave him a decree. The principal sudder ameen reversed it.

It is urged in special appeal, that the principal sudder ameen has entirely omitted to notice a very important point in the plaintiff's

case, and one upon which the moonsiff laid particular stress in his decision; this point being that the defendant, Ahmed Alee, who alone appealed against the decision of the moonsiff, had himself, in a petition to the collector on the 18th October 1846, disclaimed all right on his own part to the lands under suit, and had fully admitted the right of Buksh Alee, brother of the plaintiff, and one of the defendants, who had in his answer acknowledged that the right of occupancy pertained to the plaintiff. On referring to the decisions of the lower courts, we find this statement to be correct. We consider that it was incumbent on the principal sudder ameen before setting aside the moonsiff's decree to give full consideration to all the reasons upon which he had grounded it,—more especially to the alleged admission on the part of the defendant, (appellant,) and the legal effect of it. We therefore admit the special appeal, and remand the case to the principal sudder ameen, who will pass a fresh decision after duly considering the point above noticed.

THE 21ST DECEMBER 1852.

PRESENT:

J. DUNBAR, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION NO. 557 OF 1852.

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IN the matter of the petition of Abdool Alee Soudagur, filed in this Court on the 19th August 1852, praying for the admission of a special appeal from the decision of Sreenath Biddyabagish, principal sudder ameen of Chittagong, under date the 13th May 1852, reversing that of Nazirooddeen Mahomed, sudder moonsiff of that district, under date the 20th June 1851, in the case of Abdool Alee Soudagur, plaintiff, *versus* Runy Sarung and another, defendant.

As above.

For grounds of admission of special appeal, see preceding case, No. 548 of 1852.

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THE 21ST DECEMBER 1852.

PRESENT:

J. DUNBAR, Esq., *Judge*.

A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION NO. 558 OF 1852.

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IN the matter of the petition of Abdool Alee Soudagur, filed in this Court on the 19th August 1852, praying for the admission of a special appeal from the decision of Sreenath Biddyabagish,

As above.

principal sudder ameen of Chittagong, under date the 13th May 1852, reversing that of Nazirooddeen Mahomed, sudder moonsiff of that district, under date the 20th June 1851, in the case of Runy Sarung and others, plaintiffs, *versus* Abdool Aleé Soudagur, defendants.

For grounds of admission of special appeal, see preceding case, No. 548 of 1852.

THE 21ST DECEMBER 1852.

PRESENT :

J. DUNBAR, Esq; *Judge.*

A. J. M. MILLS, Esq., *Officiating Judge.*

PETITION No. 603 OF 1852.

Order of remand as above, the lower appellate court having incorrectly raised a question as to the informality of the plaint.

IN the matter of the petition of Bholanath Koond Chowdree and another, filed in this Court on the 1st September 1852, praying for the admission of a special appeal from the decision of Mr. W. J. H. Money, judge of 24-Pergunnahs, under date the 14th June 1852, reversing that of Mr. William Wright, moonsiff of Sulkea, under date the 28th July 1851, in the case of Bholanath Koond Chowdree and another, plaintiffs, *versus* Birjomohun Ghose, defendant.

It is hereby certified, that the said application is granted on the following grounds :

This case was decided by the judge of the 24-Pergunnahs on the 14th June 1852. The decision will be found recorded at page 49 of the published decisions for that month.

The application is on the ground, that as the widow of the deceased man was a consenting party to the plaintiff's having a decree for the full amount sued for, and as the defendant had not, in the court of first instance, raised any objection of the nature taken by the judge, and had preferred no appeal against the moonsiff's decision, it was not competent to the Court to raise any question as to the informality of the plaint. We consider the objection to be good, and we remark further that the defect, if defect it be under the circumstances, was sufficiently cured by the intervention by petition of the heir of the deceased Nitand, in the appellate court. See the case of Pertaub Chunder Dutt, appellant, *versus* Nundololl Bural, decided by a full bench of this Court on the 18th February 1851. We admit the special appeal, and remand the case for a fresh decision with reference to the foregoing remarks.

THE 21ST DECEMBER 1852.

PRESENT:

* J. DUNBAR, Esq., *Judge*.A. J. M. MILLS, Esq., *Officiating Judge*.

PETITION No. 628 OF 1852.

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In the matter of the petition of Kishenhuree Chatterjea, filed in this Court on the 10th September 1852, praying for the admission of a special appeal from the decision of Mr. W. J. H. Money, judge of 24 Pergunnahs, under date the 3rd August 1852, reversing that of Roy Hurchunder Ghose, principal sudder ameen of that district, under date the 24th July 1851, in the case of Kishenhuree Chatterjea, plaintiff, *versus* Jadub Sirdar and others, defendants.

It is hereby certified, that the said application is granted on the following grounds:

The particulars of this case will be found at pages 83, 84 and 85 of the Zillah 24 Pergunnah Decisions for August 1852.

The suit was instituted to recover possession of one village, mouza Daodpore, out of five villages which comprised the mouroosee tenure of the defendants. The village is stated to contain beegahs 390-7, and to be charged with a jumma of rupees 195-4-10.

The principal sudder ameen decreed the claim. On appeal the judge nonsuited the plaintiff, on account of want of precision of the boundaries laid down in the plaint.

The application for the admission of a special appeal is on the ground that the village sued for was an entire one, and it was not necessary to define the distinct boundaries of the several plots.

We observe that the 390 beegahs are stated to comprise the entire mouza of Daodpore. Daodpore is a known village in the zemindaree, and though it was therefore unnecessary to define the boundaries of it at all, the suit not involving any question of disputed boundaries, but a mere issue of fact whether the village was absolutely or conditionally sold to the plaintiff, yet the supplemental plaint gives the boundaries of the village with sufficient specification to admit of the execution of the decree. The judge is in error in stating that the supplemental plaint specifies the boundary merely with reference to the *jumma*. The word *jumma* has been incorrectly used in the plaint; but it evidently refers to the entire village which bears the *jumma* above quoted. We therefore reverse the decision of the judge, and remand the case to him with instructions to retry it on its merits.

Remand as above, the village sued for being an entire one, order of nonsuit by lower appellate court for want of specification of boundaries reversed.

THE 22ND DECEMBER 1852.

PRESENT :

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE No. 155 OF 1852.

*Special Appeal from the decision of Mr. W. Tayler, Officiating Judge of Shahabad, dated 27th August 1851, reversing a decree of Moulvee Zynul Abdeen, Moonsiff of Saseeram, dated 30th September 1850.*

MUSST. ZUHOORUN AND ANOTHER, (PLAINTIFFS,)

APPELLANTS,

*versus*

MUSST. BEBEE MINNUTT AND OTHERS, (DEFENDANTS,)

RESPONDENTS.

*Vakeels of Appellants—R. Norris and Meer Alee.*

A stipulation to pay profits over and above legal rate of interest is not an evasion of the law incurring the penalties of Section IX. Regulation XV. of 1793, but interest is forfeited under Section VIII.

THIS case was admitted to special appeal on the 17th March 1852, under the following certificate recorded by Messrs. A. J. M. Mills and R. H. Mytton :

(The particulars of this case will be found at page 130 of the Zillah Shahabad Decisions for August 1851).

"This was an action on a bond which stipulated that the borrower should pay the principal sum borrowed, viz., rupees 80, with rupees 18 per annum as profits with interest, in all rupees 98, within the period of one year.

"The judge reversed the decision of the moonsiff, who passed judgment in favor of plaintiff. He held that the claim was rendered invalid under Section IX. Regulation XV. of 1793, by the demand of usurious interest.

"The stipulation of increase on the loan is open and avowed; and we admit the special appeal to try whether the stipulation contained in the bond brings the document within the provisions of Section IX. Regulation XV. of 1793."

#### JUDGMENT.

The law, Section VIII. Regulation XV. of 1793 applies to this case. There has been no attempt made to elude the rules prescribed by that law by any device. The bond openly stipulates payment of interest in excess of that allowed by law. Section VIII. lays down that no interest shall be decreed when a higher rate than is authorized by law is charged, but does not impose the penalty of dismissal of the entire claim if proved. We reverse the judge's decision, and award the principal without any interest whatever. Costs in proportion.

THE 22ND DECEMBER 1852.

PRESENT :

SIR R. BARLOW, BART., }  
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 234 OF 1852.

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Special Appeal from the decision of Captain A. P. Phayre, Commissioner of Arracan, dated 19th September 1851, confirming a decree of Lieut. G. Faithfull, Principal Assistant Commissioner of Arracan, dated 1st May 1851.

ZEENUT ALEE, (PLAINTIFF,) APPELLANT,

versus

KISHEN CHURN DAROGAH, (DEFENDANT,) RESPONDENT.

Vakeel of Appellant—R. Norris

Vakeel of Respondent—Alee Afsur.

THIS case was admitted to special appeal on the 10th May 1852, under the following certificate recorded by Messrs. J. R. Colvin and R. H. Mytton :

MR. R. H. MYTTON.—“The petitioner was the original plaintiff in this case. The defendant had, in a deposition to a police darogah, declared that he suspected him and others of a theft in and arson of his house. On this he was arrested and confined, but eventually acquitted. He sued for damages for defamation by the alleged unjust charge against him.

“The principal assistant and the commissioner of Arracan concurred in dismissing the suit.

“The commissioner grounded his decision chiefly on an opinion, that a declaration of suspicion of guilt did not amount to a charge of crime such as to render it incumbent on the police to apprehend, and therefore the defendant was not liable for damages.

“From this the plaintiff prefers this application, on the plea that as the defendant by his answer has not disclosed any probable cause for accusing him of the heinous offences of theft and arson, he, the plaintiff, is entitled to damages for the false and malicious complaint as in case reported at page 204, volume VII. Sudder Dewanny Adawlut Reports. Further it is stated, that the case is strictly analagous to one admitted to special appeal by Messrs. Dunbar and Mills on the 12th August last.

“I observe that it has been ruled by the Court that a person is entitled to damages for defamation from a person who has preferred a false and malicious charge against him to the criminal authorities.

“The question in this case is, in my opinion, not exactly what the commissioner has taken it to be, viz., whether such a statement necessarily led to apprehension, but—

The appeal was dismissed upon grounds recorded in a previous decision cited in the text.

First,—"Whether a statement of suspicion of crime and prayer to apprehend amounts to a criminal charge? If it does, the precedent quoted will apply.

Secondly,—"If it does not amount to a criminal charge, does it constitute a sufficient ground for an action for defamation of character?"

"I admit a special appeal to try the above two questions; and should either of them be determined in the affirmative, to try further whether the commissioner's decision can be upheld.

"This case should be brought forward with No. 176 of 1851, as both cases arise out of the same cause of action."

MR. J. R. COLVIN.—"I can have no objection to an admission of a special appeal to try the points stated; but on the first it seems to me that nothing can be considered a criminal charge before a darogah, but a statement or complaint such as is contemplated in Clause 1, Section XXV. Regulation XX. of 1817, in which the complainant or informant deposes, on solemn affirmation, 'to the truth of the complaint.' This is a direct and public charge, for which a party may justly be held answerable at law. On the second point, mere statements by an injured party to the police of suspicions against particular persons are, in my opinion, protected communications, and ought to be so regarded on grounds of public justice and policy, so that parties may not be deterred from giving every possible clue to the police towards the tracing out of offenders. It is impossible for any judicial court to take on itself to determine whether a party's grounds of mere suspicion were or were not sufficiently well-founded so as to warrant his mentioning them to the police officers. If the police proceed to the apprehension of parties without having before them the direct complaint required by the law, the responsibility is with them."

JUDGMENT.

SIR R. BARLOW AND MR. W. B. JACKSON.—The plaint is for damages for defamation of character, arising from the defendant's having stated on oath to the police darogah that "some of his property had been stolen and his house set on fire, and that as there was enmity between him and the present plaintiff he suspected the said plaintiff of having committed these acts."

We are of opinion that the defendant's statement to the police cannot subject him to a claim for damages. He stated simply his own suspicion and the grounds of that suspicion: the grounds may have been weak, but of that the police was to judge. It is not shown that the statement was in any respect untrue, and we therefore think the commissioner of Arracan was right in dismissing the suit. Order confirmed. Costs against appellant.

SIR R. BARLOW.—A similar action was brought by Futeh Ali Chowkeedar against Kishen Churn Darogah, the defendant in this case. It was admitted to special appeal and disposed of on the 5th

August last. The majority of the Court dismissed the appeal on the grounds herein recorded. I adhere to the principle of that decision, and would dismiss this appeal.

MR. R. H. MYTTON.—I have already recorded my opinion on the point before us in the decision of the case *Futteh Aleo versus Kishen Churn*, decided August 5th 1852, which suit arose out of the same cause of action as the present. I see no reason to alter that opinion, and dissent from the decision of the majority.

THE 22ND DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 266 OF 1852.

Special Appeal from the decision of Moulvee Mahomed Nazim, Additional Principal Sudder Ameen of Dacca, dated 6th December 1851, reversing a decree of Baboo Nyaruttun Mullick, Moonsiff of Naraingunge, dated 25th January 1851.

RAMDOOLALL BOSE, (DEFENDANT,) APPELLANT,

versus

KALEECHURN DEB, (PLAINTIFF,) RESPONDENT.

Vakeel of Appellant—Kishen Kishore Ghose.

THIS case was admitted to special appeal on the 31st May 1852, under the following certificates recorded by Messrs. J. R. Colvin and R. H. Mytton:

MR. R. H. MYTTON.—“This is an action for damages on account of alleged defamatory expressions, laid at rupees 300.

“The principal sudder ameen awarded damages at rupees 100.

“The following points are submitted as grounds for preferring a special appeal:—

“*First*,—That the court of first instance, not having investigated the merits of the case, the appellate court could not do so, and should, if deeming interference necessary, have remanded the case.

“*Secondly*,—The suit is for damages for abuse. The principal sudder ameen has not considered whether an action for damages on account of such abuse will lie.

“As regards the last point, I find that this Court, in the case of *Syed Ahmed Buksh versus Peer Buksh*, decided on the 10th March 1852, ruled that general terms of abuse, without proof of special injury, do not form a ground for award of damages. In this case, among other expressions used, the defendant is said to have called the plaintiff a cow-stealer.

The calling a man a “cow-stealer,” without charging him with any specific theft, is mere general abuse, for which an action for damages will not lie. The foudaree is the court to grant redress in such a case.

"I admit a special appeal to try the question whether this is a term of general abuse such as would not form a ground of action under the above quoted precedent, without special injury being pleaded; or whether it is not rather an impeachment of a heinous crime, which may exclude a person from society or affect his reputation, and therefore actionable without pleading specific injury.

"*Thirdly*,—If the decision on this point be, that the suit will lie, is the course pursued by the principal sudder ameen illegal, with reference to the first point taken by the petitioner?"

MR. J. R. COLVIN.—"The words used in this case were '*ghoolam*,' '*sala*,' '*goroo chor*.' I think that they were all used as mere terms of general angry abuse, and not as implying, or being so employed as naturally to be taken as implying, any allegation of a specific act, the commission of which could be understood as affecting the party's character."

Kishen Kishore Ghose for petitioner.—"This suit is for damages for defamation. The words alleged to have been used are of general abuse, and in accordance with the precedent at page 160 of *Sudder Dewanny Adawlut Decisions*, 10th March last, not form grounds of action in a civil court.

JUDGMENT.

It is not pleaded that any specific act of theft was charged by the defendant against the plaintiff. The other words are terms of abuse, but not such as bring the case within the jurisdiction of the civil courts. The plaintiff might, had he applied to the criminal court, have obtained redress. The precedent quoted is in point. We reverse the principal sudder ameen's decision with costs.

THE 23RD DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., } *Judges.*
W. B. JACKSON, ESQ., }R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 203 OF 1852.

Special Appeal from the decision of Mr. W. St. Quintin, Additional Judge of Tirhoot, dated 16th April 1851, affirming a decree of Moulvee Niamut Alee Khan, Principal Sudder Ameen of that district, dated 28th December 1848.

SHEOCHURN LALL AND ACHENUNTLALL MAHTOO,
(PLAINTIFFS,) APPELLANTS,*versus*

SOORJA KOONWUR AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Vocal of Appellants—J. G. Waller.

THIS case was admitted to special appeal on the 26th April 1852, under the following certificate recorded by Messrs J. R. Colvin and A. J. M. Mills:

(For particulars of this case, see Tirhoot Zillah Decisions, April 1851, pp. 151, 152.)

“The suit was brought to set aside a lease and recover mesne profits from *zur-i-peshgeedars*, on the ground that they had realized more than the sum advanced, with its legal interest, from the usufruct of the estate.

“The defendants pleaded that the plaintiffs were bound to make good the principal advance before possession could be awarded to them, and that the lease did not condition for any portion of the income of the estate being credited against the advance.

“The lower courts held that the appellants must make good the advance before they can sue for possession, and dismissed the claim. The additional judge proceeds in calculating the amount realized only on the receipts upon a farm which the mortgagee had granted, and observes that those receipts merely satisfied the legal interest on the advance.

“It has been ruled, we remark, by decisions of this Court, the last is dated the 15th of April 1852, in the case of Dooba Singh, special appellants, that a lease granted on payment of an advance or on *zur-i-peshgee*, is to be regarded as an ordinary mortgage, and that Section X. Regulation XV. of 1793 applies to it, and it is contended by the pleader for the appellants, that the judge was bound to call on the lease-holder to deliver in the accounts of the gross receipts of the estate, and that the gross receipts do not mean a mere farming jumma.

The letting of a property pledged in usufructuary mortgage to a middle-man is no bar to the proprietors having an account taken of the gross receipts from the tenantry.

“ We would lay the special appeal to try the following point:—

“ Whether the account of the gross receipts from the property mortgaged to appellant, given in by the mortgagee, as referred to in Section XI. Regulation XV. of 1739, has reference to the gross jumma-bundee account of the estate, or to the accounts only of the receipts on any lease into which he may have chosen to enter ?

“ We observe that the wording of the law in question is, that the mortgagee is ‘ to be required to deliver in the accounts of the gross receipts from the property mortgaged, and also of his expenditure for the management and preservation of it,’ which accounts are to be open to examination and objection by the mortgager, and that the Court is thereon to adjust the account between the parties.

“ We admit the special appeal to try the point above stated, and also if the account of the mortgagee’s receipts from his farmer, of his expenditure connected therewith, is to be received as on the first instance, sufficient, whether they have been duly subjected to check in this case, and whether there exist good grounds for remanding the case, with a view to a further investigation as to whether the farming collections represent the fair value of the estate while in the hands of the mortgagee, or as to how that value can most justly be determined.”

Mr. J. G. Waller contends—That his client has a right to have account taken of the gross receipts, not merely the receipts of the mortgagee from his farmer, which may be collusive. The medium of collection is immaterial: if the mortgagee sub-lets, he places the sub-tenant in his own shoes; and the mortgager is entitled to have account taken of his, the sub-tenant’s, receipts.

JUDGMENT

SIR R. BARLOW AND MR. R. H. MYTTON.—On the first point contained in the certificate, we are of opinion, that the gross receipts referred to in Section XI. Regulation XV. of 1793 are the gross receipts from the tenantry of the estate mortgaged. If the mortgagee creates a middle-man between him and that tenantry, this will not exonerate him from the necessity of giving an account of the *gross* receipts. Were it to be held otherwise, a mortgagee might at his pleasure bar a recovery for any period he chose by letting to a middle-man at just such a rent as would cover the interest of his money, let the actual assets of the mortgaged estate be what value they may.

We reverse the decision of the judge and the principal sudder ameen, and remand the case to the latter, in order that an account may be taken on the principle above indicated, that is in the same manner as if the mortgagee had not let to a farmer.

MR. W. B. JACKSON.—A mortgagee in possession, has farmed the mortgaged property. On a claim for adjustment of accounts, he shows the amount he has received from the estate, *viz.*, the amount of the rent paid by the farmer; and debits himself with this.

It is now alleged that he ought to be debited not with his own actual receipts, but with the sum realized by the farmer from the under-tenants. I find the law says the words "his gross receipts", that is the mortgagee's gross receipts; and I am clear that it means the sum he has received, not the sum he might have received, had he made some other arrangement or collected direct himself from the under-tenants. It should be premised that there is no allegation of fraudulent leasing, and we must consider the farm to have been a good *bond fide* lease, at the full rent obtainable. Under these circumstances it seems to me quite clear that the mortgagee, in an adjustment of accounts with the mortgager, can only be debited with the amount of his actual receipts from the estate and no more.

The law says this distinctly; and as the object of the adjustment is to discover whether the mortgagee has realized the amount of the loan with legal interest, I cannot see the justice of declaring he has received more than he has actually received in the way of payment. It is possible that the farm was the most advantageous possible arrangement and that had he not farmed the property he would have realized less. Indeed, it must be assumed, in the absence of all charge or averment of fraud, that this was the case.

I dissent from the judgment of my colleagues in this case.

THE 24TH DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }
W. B. JACKSON, ESQ., } *Judges.*

R. H. MYTTON, ESQ., *Officiating Judge.*

CASE NO. 279 OF 1852.

Special Appeal from the decision of Syed Ushruf Hossein, Principal Sudder Ameen of Hazareebagh, dated 26th December 1851, reversing a decree of Sree Gopal Lall, Moonsiff of Hazareebagh, dated 27th September 1850.

MAYEE DHURNUNT KOOWUREE, (PLAINTIFF,) .

• APPELLANT,

versus

BISHEN MANJEE AND OTHERS, (DEFENDANTS,) RESPONDENTS.

Vakeel of Appellant—Kishen Kishore Ghose.

THIS case was admitted to special appeal on the 15th June 1852, under the following certificate recorded by Sir R. Barlow and Mr. R. H. Mytton:

Ignorance of
the law is no
sufficient reason
for the

admission of
an appeal be-
yond the peri-
od fixed by
law.

"The moonsiff in this case gave a decision for the plaintiff on the 27th September 1850. Copy of the decree was given to the defendants on 1st October 1850. It is urged for the petitioner that the appeal should have been filed in the principal sudder ameen's court on the first day of the opening of the courts after the Dusserah vacation, namely 21st November 1850, whereas it was only put in on the 19th December 1850, by a miscellaneous application on 8 annas paper, pleading appellant thought a month was allowed after opening of court. This application was admitted and the case was disposed of by the principal sudder ameen on the 26th December 1851.

"The admission of the appeal is opposed to Clause 4, Section II. Regulation VII. of 1832, and the principal of the Court's decision at page 166 of Sudder Dewanny Adawlut Decisions, 31st March 1851. We admit a special to try whether the admission by the principal sudder ameen is good according to law."

JUDGMENT.

The appeal was made after the lapse of the established period, and the reason assigned, that the appellant was an ignorant villager and did not know the rule, is not sufficient or satisfactory. We reverse the decision of the principal sudder ameen, and affirm the decision of the court of first instance.

S U M M A R Y C A S E .

THE 23RD DECEMBER 1852.

PRESENT:

SIR R. BARLOW, BART., }
W. B. JACKSON, ESQ., } *Judges.*
J. DUNBAR, ESQ., }
A. J. M. MILLS, ESQ., } *Officiating Judges.*
R. H. MYTTON, ESQ., }

CASE No. 427 of 1852.

Miscellaneous Application for a special appeal from the decision of the Honorable R. Forbes, Judge of Tirhoot, dated 26th March 1852.

MUSST. OOMATUL FATEMAH BEGUM AND OTHERS,
(PLAINTIFFS,) PETITIONERS,

versus

JANEE KHANUM AND ANOTHER, (DEFENDANTS.)

Vakeel of Petitioners—J. G. Waller.

Vakeel of Defendants—Kishen Kishore Ghose.

THIS case was “referred” by Mr. A. J. M. Mills on the 15th August last, “to a sitting of all the judges to decide the following point with reference to the order of this Court, dated May 15th 1852, (present Mr. Mytton,) ruling that only one summary appeal from an order of nonsuit is admissible, provided that the first appellate court reject the petition, which order is grounded on the order of a full bench, dated 22nd April 1852. Is it not competent to the Sudder Dewanny Adawlut, with reference to Clause 3, Section III. Regulation XXVI. of 1814, and Clause 10 of the same Section to receive a summary appeal from an order of the lower court dismissing a summary appeal against a nonsuit by the court of first instance, when such dismissal is not founded upon the groundlessness or litigious character of the appeal, but on a consideration of the point of law or practice arising from the pleadings, and the order of the court of first instance.”

There is no special appeal from an order rejecting a petition of summary appeal under Clause 10, Section III. Regulation XXVI. of 1814.

Mr. J. G. Waller, for petitioners—Both the lower courts nonsuited the plaintiffs, on the ground of absence of jurisdiction, the defendants being residents in another district. The petitioners apply for special appeal summarily against the judges summary order rejecting their appeal. Cases of this nature have already been decided by the Court, and it is only reasonable to admit a summary appeal at an early stage in order to prevent all the delay and expense incurred in going on with a case to trial and decision.

Baboo Kishen Kishore Ghose.—The point was never argued before, though cases have been decided without argument. A regular appeal, if preferred by the judge, would have enabled the

petitioner to come up to the Sudder Court specially: but he has chosen to make a summary application to the judge; and by Clause 10, Section III. Regulation XXVI. of 1814, and rejection of petition, all orders summarily passed in appeal by the judge are final, the petitioners must be bound by its provisions. A special appeal will only be admitted when the law distinctly allows it.

JUDGMENT.

The Court are of opinion, that the petitioners' prayer is inadmissible. The concluding passage of Clause 10, Section III. is clear, and as the law stands, the petition must be rejected.



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Bhyrub Indurnurain Raee v. Ranee Bhoobun Maye Dibbee.

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THE 1ST JULY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 79 OF 1845.

Regular Appeal from a decision passed by Moulvee Abdool Ali, Principal Sudder Ameen of Zillah Rajshahye, December 31st, 1844.

ROUSHUN KHATOON AND OTHERS, APPELLANTS,

(PLAINTIFFS,)

versus

JUGGURNATH NUNDY AND COLLECTOR OF RAJSHAHYE, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—J. G. Waller.

Wukeel of the Collector—Pursun Komar Tagore.

Wukeels of the other Respondent—Rampran Raee and Bunsee Buddun Mitr.

MESSRS. TUCKER AND HAWKINS.—The plaintiffs are proprietors of *pergunnah* Atteea, in zillah Mymensing. On the 29th December 1838, they filed this plaint in the zillah court of Rajshahye, in which the following circumstances were set forth.

That, in former times, there was a *tahod* recorded in the collector's office, zillah Rajshahye, for an estate designated 'Najae Pae Bawky,' in *pergunnah* Eusoofshahye, (*sudder jumma Sicca* rupees 127-11) in the name of Mahomed Khan Chowdhree.

That in 1190 B. S., when the *muzkooree* or petty *mehals* were separated from the zemindaree to which they had heretofore been attached, Ali Yar Alif Khan, the grandson of Mahomed Khan, the then occupant, executed a *dowl kistbundy* for the above *talook*.

After some time, the collector's officers, in accordance with the *dheedars* papers, added to the words 'Najae Pae Bawky', the word 'Gopeenath Batty'; and, from that time, the estate has been designated in various accounts and statements in the collector's office as 'Najae Pae Bawky Gopeenath Batty'. Under this title the estate was sold for a balance of Government revenue on

the 2d *Aughun* 1233, and purchased by Kalikunth Lahoree and Roopindur Nurain Photedar. After confirmation of the sale, the purchasers received an *umulnameh* and executed a *dowl kistbundy*, in all which documents the estate was designated as 'Najae Pae Bawky Gopeenath Batty'.

That the purchasers after a long and fruitless attempt to discover the lands appertaining to the estate they had purchased, and with a view of getting possession of *mehal* Gopeenathpoor, in *pergunnah* Attya, zillah Mymensingh, their (the plaintiffs') property, presented a petition to the collector, stating that they had purchased the estate 'Najae Pae Bawky Gopeenathpoor', besides *kismuts* Sheonuggur, Huveleeparah, Chalashahzadpoor and Joogbellae; but that the former proprietors would not give up possession to them, and praying to be put in possession thereof.

That the collector's officers, in league with the purchasers, drew out a *roobukarree* for the collector's signature, dated 19th April 1827, in which the estate sold is designated 'Najae Pae Bawky Gopeenathpoor', in direct contradiction to all former statements. This done, the purchasers applied to have a copy of the said *roobukarree* sent to the court of zillah Rajshahye, in order to their being put in possession of *kismuts* Sheonuggur, &c. &c., and another copy to the court of zillah Mymensingh, in order to their being put in possession of Najae Pae Bawky Gopeenathpoor. The judge of Mymensingh, paying no attention to their agent's remonstrances, passed orders to put the purchasers in possession of *mehal* Gopeenathpoor, and made a return to the collector of Rajshahye accordingly.

That, on the 13th *Bhadoon* 1234, the purchasers, with a view to some future fraudulent design, filed a receipt in the court of zillah Rajshahye, acknowledging that they had received possession of *kismuts* Sheonuggur, Kamarparah, Mahomedpoor, Chalashahzadpoor, Huveleeparah and Joogbellae; but that their people never gave up possession of any of the above *mehals*.

That, on the 1st *Jeyte* 1238, Kaleekunth Lahoree's moiety of the estate was sold for a balance due from a farmer of another estate, for whom he was security, and purchased by Juggurnath Nundy. After some months, at the representation of the purchaser, orders were sent by the collector to the judges of zillahs Rajshahye and Mymensingh to put him in possession of *kismut* Sheonuggur, &c., and *mehal* Gopeenathpoor. That the judge of Mymensingh, on 2d July 1832, refused to interfere summarily, and referred Juggurnath Nundy to a regular suit in the civil court. With regard to the property in zillah Rajshahye, Juggurnath Nundy, following the example of Kalikunth Lahoree, filed a receipt in the judge's court in *Assar* 1239, acknowledging to have received possession of the *kismuts* Joogbellae, &c. &c. &c.;

and, a short time afterwards, presented a petition to the magistrate complaining that they (the plaintiffs) were interfering with and disturbing his possession in *kismut* Joogbellae. The magistrate proceeded under Regulation 15, 1824; and, on 1st September 1834, recorded a proceeding referring Juggurnath Nundy to the civil court, as he did not find him in possession of the said *kismut*, and this order was confirmed in appeal by the commissioner.

That Juggurnath Nundy, not satisfied, presented a petition to Mr. C. W. Steer, the commissioner, full of mis-statements, and procured an order from that gentleman to the collector to put him in possession of the land purchased by him, without reference to the judge of Mymensingh's order, or to the issue of the suit decided under the provisions of Regulation 15, 1824.

That in pursuance of those orders, the collector, on 28th May 1835, sent *roobukarrees* to the Rajshahye and Mymensingh courts, to put Juggurnath Nundy in possession of *kismuts* Sheonuggur, &c. &c., in zillah Rajshahye, and *mehal* Gopeenathpoor in zillah Mymensingh, which was done in *Bhadoon* 1242 B. S.

It is not necessary to go further into the proceedings on this plaint, for it was nonsuited by the principal sudder ameen on 9th September 1841, who remarked that the evidence went to shew dispossession by Kalikunth Lahoree in 1234, and therefore he nonsuited the plaintiffs, authorizing them to bring a fresh suit against Kalikunth Lahoree for dispossession in 1234 B. S. Accordingly, the present suit was filed on the 2d October 1841, and with this only have the Court to do at present.

We observe that the present suit is the same as the former one *totidem verbis* as far as above stated, that is setting forth dispossession by Juggurnath Nundy in 1242 B. S. But, towards the close of the plaint, there is a sentence declaratory of the necessity of conforming to the orders of the principal sudder ameen; and therefore, though unwillingly, they sue for dispossession by Kalikunth Lahoree in 1234 B. S., and for mesne profits from that date.

It is obvious, that the principal sudder ameen's order of 9th September 1841 was erroneous. Under the circumstances stated, he should have dismissed the plaint; but the plaintiffs had their remedy. They might have had a summary appeal on the order of nonsuit, or a regular appeal on the merits; or, lastly, they might have applied to the principal sudder ameen for a review of his order. But, instead of adopting one or other of those courses, they follow up the extremely improper order of the principal sudder ameen, and sue for dispossession with *wasilat* from 1234 B. S., still asserting, in the body of their plaint, that they were not dispossessed till the year 1242 B. S., and then by the defendant Juggurnath Nundy.

It is quite impossible in our opinion to adjudicate on such a plaint, so inconsistent in its statements; and this being the case, we have no option but to nonsuit the plaintiffs again, which however we do reluctantly, for it is clear to us that they have been led into the present dilemma through the irregular and improper order of the principal sudder ameen. We accordingly nonsuit the appellants with costs.

SIR R. BARLOW.—The circumstances connected with the institution of this suit have already been given. As, however, I differ from my colleagues as to the propriety of nonsuiting the plaintiffs, whose case in my judgment should be dismissed, I beg to record a separate minute.

I do not consider the suit filed by the plaintiffs on 15th *Poos* 1245, and the present one filed on 17th *Assin* 1248, identical.

In 1238, the share of Kalikunth Lahoree in the disputed lands was sold by the collector for balances due by a farmer under the court of wards, for whom the said Lahoree was security; and his share was bought by Juggurnath Nundy. In 1245, the plaintiffs sued the said Juggurnath and his co-sharer Roop Indernurain Podar with the collector, alleging that Juggurnath, on taking possession of his purchase, *had in* 1242 ousted them of lands which never were in the possession of Kalikunth Lahoree, the former proprietor.

The principal sudder ameen, Moulvee Abdool Ali, after full investigation of the case, on proof of the fact that Juggurnath only entered on the lands which the former proprietor had held, and also on proof that Kalikunth Lahoree had, so long back as the year 1234, held the lands in his possession, nonsuited the plaintiff on the 25th *Bhadoon* 1248, on the ground that there was no proof of the dispossession of the plaintiffs by the party sued (*i. e.* Juggurnath Nundy) in 1242; but rather, on the contrary, that the plaintiffs had been ousted by Kalikunth Lahoree (a party not sued) in 1234, was clearly established; and he, at the same time, instructed the plaintiffs to sue accordingly, including Kalikunth Lahoree as a defendant.

On the 17th *Assin* 1248, the plaintiffs sued (1) Juggurnath Nundy, (2) the widow of Roop Indernurain Podar, (3) the collector, and (4) Kalikunth Lahoree, for possession and *for wasilat* from 1234.

In 1251, 18th *Poos*, the principal sudder ameen dismissed their claim to one village, Gopeenathpoor, which he gave to the defendants; but decreed the remaining disputed lands to the plaintiffs, with *wasilat* from 1234 against Kalikunth and Juggurnath Nundy, for the periods they respectively held possession.

The two cases now before the Court are appeals against this order. The one (No. 78) is preferred by the original defendants against

the decree giving to the plaintiffs *wasilat* from 1234 together with the lands decreed; the other (No. 79) is preferred by the plaintiffs against so much of the decree as awards the village Gopeenathpoor to the defendants, and contains a claim to *wasilat* from the year 1234.

Now, it appears to me, that these suits are two distinct actions. The first originated (so to speak) in a private sale for balance due to the court of wards by the security of a farmer; the second in a public sale for balance of revenue due to Government. The cause of action in the one is said to have arisen in the year 1234; in the other in the year 1242; and the defendant, Juggurnath Nundy, now sole proprietor, could not have been a party to the dispossession in 1234, for he bought in 1238 only.

The cause of action in the suit filed in 1245 is dispossession of the plaintiffs by Juggurnath Nundy, who is said to have taken, in virtue of his purchase of Kalikunth Lahoree's rights, lands which the latter had never had in his possession. The cause of action in the suit filed in 1248 is dispossession by Kalikunth Lahoree in 1234, by virtue of his purchase at the collector's sale for Government revenue. Moreover, in the first suit instituted, the action was laid at 1,600 rupees; in the present at 9,000 rupees inclusive of *wasilat*. The features then of the two suits, and the points on which the decision of them rests, are distinct and separate; and the first question which calls for adjudication is whether the plaintiffs are in time? Have they come into court within the 12 years allowed by the limitation law, Section 14, Regulation 3 of 1793? I am of opinion they have not.

They claim possession and *wasilat* from 1234 at the rate of 400 rupees per annum, and have obtained a decree for all but one village, with *wasilat* from that period; with this portion of the decree they rest satisfied. But more, they appeal to this Court against so much of the principal sudder ameen's decree as deprives them of Gopeenathpoor, and its *wasilat* as above.

In my judgment then their plaint is both clear and defined as to time and cause of action, and no inconsistency in other parts of it can bring this suit within the pale of an order for nonsuit. Indeed, I do not comprehend in what form the suit can be brought.

An action for dispossession from 1242, would be barred by Section 16, Regulation 3, of 1793; for the order of nonsuit passed by the principal sudder ameen in 1248 is final; no appeal having been preferred against it.

If again an action be brought, as now, for dispossession from 1234, the proof of the plaintiffs having been ousted from that period, will bring them within the operation of Section 14 of the last quoted law.

In the present suit I hold the cause of action to have arisen, as is clearly shewn by the plaintiffs in their plaint and in their appeal, in 1234. Their suit I hold to be inadmissible; and without further going into its merits, I would dismiss their plaint and their appeal under the statute of limitation.

THE 1ST JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 78 of 1845.

Regular Appeal from a decision passed by Moulvee Abdool Ali, Principal Sudder Ameen of Zillah Rajshahye, December 31st, 1844.

JUGGURNATH NUNDY, APPELLANT, (DEFENDANT,)

versus

ROUSHUN KHIATOON AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

Wukeels of Appellant—Rampran Raee and Bunsec Buddun Mitr.

Wukeel of Respondents—J. G. Waller.

THIS is the same case with No. 79 of 1845, disposed of this day plaintiffs and defendant having both appealed from the decision of the lower court. The original plaint having been nonsuited in the appeal made by the plaintiffs, No. 79, we have now only to cancel the decision of the principal sudder ameen. Costs chargeable to the respondents.

THE 1ST JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 436 OF 1847.

Special Appeal from a decision passed by the First Principal Sudder Ameen of Zillah Tirhoot, December 20th, 1845 ; modifying a decree passed by the Sudder Ameen of that district, July 31st, 1845.

CHUNDUR DUT SINGH AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

HOWREE MISR AND OTHERS, RESPONDENTS, (PLAINTIFFS.)

‡ *Wukeel of Appellants—J. G. Waller.*

Wukeel of Respondents—Nilmoney Banerjee.

THIS case was admitted to special appeal, on the 10th July 1847, under the following certificate recorded by Mr. C. Tucker :—

‘ In this case the petitioners (appellants,) with two other persons, Achumbit Singh and Sheo Lal Singh, were sued by the plaintiffs for possession of certain lands with *wasilat*, and a decree was recorded against them. They all appealed; but, afterwards, Achumbit Singh and Sheo Lal Singh withdrew. The decision of the lower court was (with some alteration in regard to the quantity of land sued for) affirmed; but Achumbit Singh and Sheo Lal Singh were exonerated from costs and *wasilat*, because they had withdrawn from the appeal.

‘ On this point the co-defendants (appellants) apply for a special appeal; and as there is no other reason assigned by the principal sudder ameen, for exonerating Achumbit Singh and Sheo Lal Singh, than that they withdrew from the appeal, I admit the same, as it was contrary to the practice of the courts to exonerate parties on such grounds.’

As the appellants have not made Achumbit Singh and Sheo Lal Singh respondents, and consequently no notice has been served on them to attend the court, we cannot adjudicate the case in their absence; but being of opinion that the reason assigned by the principal sudder ameen for exonerating the said Achumbit Singh and Sheo Lal Singh is insufficient, we remand the proceedings to him, with instructions to summon all parties

before him again, and decide the case *de novo*. The respondents, who have appeared in this Court unnecessarily, are to pay their own costs in this Court.

THE 1ST JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 314 OF 1847.

Special Appeal from a decision passed by the Acting Judge of Zillah Backergunge, August 29th, 1845; confirming that of the Principal Sudder Ameen of that district, August 12th, 1843.

RUTTUN MULLA DIBEEA AND KASHEEP
DIBEEA, APPELLANTS, (DEFENDANTS,)

versus .

KURREEM-O-NISSA AND SURFOODDEEN, RESPONDENTS,
(PLAINTIFFS.)

Wukeel of Appellants—Kishen Kishore Ghose.

Wukeel of Respondents—None.

THIS case was admitted to special appeal, on the 27th April 1847, under the following certificate recorded by Mr. Charles Tucker:—

‘ In this case the plaintiffs are *ousut talookdars*, and the defendants *neem-ousut talookdars* of *jowar Tera Chur*. The *huzzooree talookdar* brought a summary suit for balance of rent for 1248 against both. The collector decreed against the *ousut talookdars*, exonerating the *neem-ousut talookdars*, against whom the *ousut talookdars* might bring their claim, if they had not already received the rent stipulated to be paid to them by the *neem-ousut talookdars*.

‘ The present suit was brought by the *ousut talookdars* to set aside the collector’s summary award, and they obtained a decree in both the lower courts, exonerating them and decreeing the balance against the *neem-ousut talookdars*.

‘ This is opposed to law and practice. The zemindar cannot sue the *neem-ousut talookdar*, with whom he has entered into no engagements. The *neem-ousut* tenure is constituted by the *ousut talookdar*, to whom the rents are payable. If the *neem-ousut talookdar* be in balance to the *ousut talookdar*, the latter should attach

the *talook*, or enter a summary suit against the *neem-ousut talookdar* ; therefore I admit this special appeal.'

On a perusal of the record we find that the *ousut talook* having been advertized for sale in execution of the summary decree, for the recovery of the zemindar's rent, the *neem-ousut talookdars* paid up the balance and thus prevented a sale. They afterwards sued the *ousut talookdars* to recover the amount thus paid on their account ; but their suit was dismissed on proof that they themselves were in balance to the *ousut talookdars*. The amount paid by the *neem-ousut talookdars* would therefore be credited to them in part payment of their rent to the *ousut talookdars*. Thus there would seem to be no object whatever to be gained by this suit. But the collector's summary award being strictly correct in principle, we annul the decisions of the lower courts, with all costs payable by the respondents, the *ousut talookdars*.

THE 1ST JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 519 OF 1847.

Special Appeal from a decision passed by the Additional Judge of Hooghly, August 21st, 1845 ; altering a decree passed by the Additional Principal Sudder Ameen of that district, September 3d, 1844.

RUSSIK LAL SEIN, AND OTHERS, APPELLANTS,

(PLAINTIFFS,)

versus

COLLECTOR OF CALCUTTA AND OTHERS, RESPONDENTS,

(DEFENDANTS.)

Wukeel of Appellants—J. G. Waller.

Wukeels of Respondents—Pursun Komar Tagore and Ameer Ali.

THIS case was admitted to special appeal, on the 7th August 1847, under the following certificate recorded by Mr. C. Tucker, Sir R. Barlow, and Mr. J. A. F. Hawkins :—

'This suit was first instituted by Surruj Munnee, the widow of Bhyrub Chundur, for the recovery of a moiety of the ancestrel estate, under circumstances which it is not necessary to detail here. She died before the suit was determined, and her grandsons, the present plaintiffs, took her place. The suit was then thrown out, with reservation to the grandsons to institute a fresh suit.

This was eventually over-ruled by this Court, and the original suit restored to the file to be carried on at the suit of the grandsons, whose heirship was not opposed. The lower courts decreed the estate to the plaintiffs, but refused to give them *wasilat* from the death of Sooruj Munnee. Sooruj Munnee did not sue for *wasilat*; but she would nevertheless have been entitled to it from the date of institution of the suit. The reasons assigned for not giving *wasilat* are fanciful.

‘Special appeal admitted, as it is contrary to the practice of the courts, under such circumstances, to refuse *wasilat* from the date of the institution of the suit.’

MR. TUCKER AND SIR R. BARLOW.—From the record in this case we find that Hurris Chundur and Hem Chundur, cousins, were joint proprietors of *tolook* Palara, in *pergunnah* Boro, zillah Hooghly. Hurris Chundur married Tara Munnee, by whom he had a son, Bhyrub Chundur. This latter married Sooruj Munnee. Bhyrub Chundur died in 1201, leaving his widow, his mother, and a daughter, Ræe Munnee.

In 1208 Sooruj Munnee made over (by a deed of relinquishment) her husband’s moiety of the *talook* to Hem Chundur, on which Tara Munnee and Ræe Munnee instituted a suit against Hem Chundur, to set aside this transfer. After a lengthy litigation, the transfer was upheld during the life time of Sooruj Munnee, but not to affect her husband’s heirs after her death.

Pending this, the rights of Hem Chundur were sold for a defaulting stamp vendor, for whom he became surety, and the purchaser took possession of the entire *talook*. In 1836, Sooruj Munnee instituted the present suit against the purchaser for her half share; and dying in 1839, was succeeded by her grandsons, the sons of Ræe Munnee. From the above data, we are of opinion that the appellants are entitled to *wasilat* from the death of Sooruj Munnee only, inasmuch as their title, as the heirs of Bhyrub Chundur, commenced on her demise; up to which date her life interest in the estate belonged to Hem Chundur.

We therefore amend the decision of the additional judge of Hooghly, and award *wasilat* to the appellants from the date of the demise of Sooruj Munnee (viz. 25th July 1839) payable by the respondent, the purchaser, who will also pay the appellants’ costs. The costs of Government to be paid by the appellants.

MR. HAWKINS.—I concur in the judgment, but am of opinion that as the suit of Sooruj Munnee could not be sustained, as she had parted with her life interest, it was rightly thrown out; and her heirs, or rather the heirs of her husband should have instituted a fresh suit upon her death. This point, however, has been disposed of, and I merely notice it, in order that the course adopted in this suit, with regard to a plaint which could not be sustained, might not form a precedent for future cases.

THE 1ST JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 278 OF 1847.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Zillah Hooghly, August 30th, 1845 ; confirming a decree passed by the Moonsiff of Rajapore, June 7th, 1845.

ISHWUR CHUNDUR SIRCAR, APPELLANT, (DEFENDANT,
WITH KALACHUND MULLICK,)

versus

SARTUK NAE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondent—None.

THIS case was admitted to special appeal, on the 17th May 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘ In this case the defendant, Kalachund Mullick, obtained a summary decision under Regulation 7, 1799, for balance of rent against the plaintiff, and this suit was brought to reverse that decision. The other defendant, Mangobind Sircar, now represented by the petitioner (appellant), Ishwur Chundur Sircar, was included in the suit, the plaintiff alleging him to be the person to whom he paid rent, and denying that he was a *ryut* of Kalachund. The question hinged on this, viz. whether certain lands, which Kalachund Mullick alleged to be his rent-free lands, confirmed as such by the special commissioner, Mr. H. Moore, had really been upheld by that officer ; or whether they had been declared by the same officer to be not rent-free, and delivered over to the zemindar, from whom the defendant, Mangobind Sircar, holds his *putnee* lease.

‘ The courts below ruled that Kalachund Mullick had been maintained in his *lakhiraj* tenure, and, therefore, dismissed the plaint ; hence, although Mangobind Sircar appears as defendant, and the suit was dismissed in both lower courts, yet the dismissal is ruin to his claim, and thus he comes forward to demand a special appeal, on the grounds that Kalachund Mullick’s *lakhiraj* claim was thrown out, and the lands made over to the zemindar of whom he holds his lease.

‘ It appears that the Government and the zemindar sued simultaneously to resume the lands claimed by Kalachund Mullick as

rent-free. The special deputy collector dismissed both claims, confirming the *lakhiraj* tenure. Government and the zemindar both appealed. The special commissioner, Mr. H. Moore, declared the zemindar entitled to the lands as his *mal* lands, and *therefore* dismissed the Government appeal. The courts below have most unaccountably ruled that, because the Government claim was dismissed, the *lakhiraj* tenure was upheld, and confirmed in Kalachund Mullick. This is not the case; and I admit the special appeal to try the point on which the propriety of the decisions of the lower courts entirely depends.'

On a perusal of the decree of the special commissioner, Mr. Henry Moore, dated 22d March 1844, it is clear that the lands were declared to be *mal* and the property of Muharajah Muhtab-Chundur Buhadoor of Burdwan, and that on these grounds the claim of Government was dismissed; and that the lower courts have fallen into the mistake of concluding the rent-free tenure had been upheld, because the Government claim had been rejected.

Under these circumstances, we reverse the decisions of the lower courts, as well as that of the collector dated 7th April 1844, with all costs chargeable to Kalachund Mullick.

THE 1ST JULY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 279 OF 1848.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Hooghly, August 30th, 1845; confirming a decree passed by the Moonsiff of Rajapore, June 7th, 1845.

ISHWUR CHUNDUR SIRCAR, APPELLANT, (DEFENDANT,
WITH KALACHUND MULLICK,)

versus

RAMJEE NUNDEE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondent—None.

THIS case, which was admitted to special appeal by Mr. C. Tucker on the 17th May 1847, is of precisely the same nature as that decided this day, numbered 278 of 1847. The same order is passed. The decisions of both courts and of the collector are set aside, with all costs against the defendant, Kalachund Mullick.

THE 1ST JULY 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No 280 OF 1847.

*Special Appeal from a decision passed by the Additional Principal
Sudder Ameen of Hooghly, August 30th, 1845 ; confirming a
decree passed by the Moonsiff of Rajapore, June 7th, 1845.*

ISHWUR CHUNDUR SIRKAR, APPELLANT, (DEFENDANT,
WITH KALACHUND MULLICK),

versus

RAMBULLUB NUNDEE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondent—None.

THIS case, which was admitted to special appeal by Mr. C. Tucker on the 17th May 1847, is of precisely the same nature as that decided this day, numbered 278 of 1847. The same order is passed. The decisions of both courts and of the collector are set aside, with all costs against Kalachund Mullick.

THE 1ST JULY 1848.

PRESENT :

ABER. DICK, Esq.,

JUDGE.

CASE No. 100 OF 1845.

*Regular Appeal from a decision passed by the Principal Sudder
Ameen of Zillah Mymensingh, Mr. C. Mackay.*

SADIR KHAN AND BIKH JAUN BIBI, APPELLANTS,
(DEFENDANTS,)

versus

KHUTTEE JAUN BIBI, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Gholam Sufdur.

Wukeel of Respondent—Kishen Kishore Ghose.

SUIT laid at Company's rupees 4,250, 11 annas, 3 gundahs,
3 cowries for possession on certain talcooks and houses.

The claim is founded on right of inheritance. The defence admits the right, but declares its supersession by deed of gift and of dower.

The alleged fact of the transfer of the property in question by the father of plaintiff to his wife in lieu of dower, rests on a *kabeennameh*, or deed of marriage settlement, dated 1201 B. Æ.; and it was in virtue of that transfer that the deed of gift was made.

The principal sudder ameen, for the reasons set forth in his decision, did not consider the validity of the *kabeennameh* established, and therefore decreed the whole claim.

The main ground of appeal is, that the *kabeennameh* and transfer have been duly and clearly proved :—*first*, by evidence that *kabeennamehs* are always in appellants' family, and without them no marriage is valid ; *secondly*, by registry of the mother's name as proprietor of the *talooks* on the father's petition in 1831 ; *thirdly*, by a suit instituted by the mother for pre-emption, in virtue of being proprietor of the *talooks* ; *fourthly*, by an *ikrarnameh*, or deed acknowledging the *kabeennameh* by the father in 1238 B. Æ., on occasion of the *kabeennameh* being missing ; and, *fifthly*, by proof of possession of the mother from date of the *kabeennameh* on the *talooks*.

The appellants' pleader further urged, that the respondent in her petition for permission to sue as a pauper had stated the value of her claim to amount to 2,806 Company's rupees, 8 *annas*, 9½ *gundahs*, as required by Clause 2, Section 5, Regulation 28, 1814, and had obtained permission accordingly. She laid her suit, however, at 12,710 Company's rupees, 8 *annas*, 7 *pie* ; she ought therefore to be nonsuited.

The demurrer for nonsuit was not urged in the answer ; it cannot therefore be now admitted.

With respect to the pleas in appeal, it is impossible at this distance of time to prove or disprove the *kabeennameh*. The property in question is, however, therein stated to be made over in lieu of dower, and the registry in the wife's name in 1831, or 1238 B. Æ., expressly on that account, is evidence of it so far as the admission of the husband. So may the suit for pre-emption and the *ikrarnameh*, or deed of acknowledgment written in 1238 B. Æ. But it appears clear from the petitions of the grand-father, and of the son (the husband) that the grand-father's name was still in the registry in 1214 B. Æ.; and it further appears from a petition of the son, that the property had been attached by the criminal court as belonging to the grand-father, on which account the story of the gift to the son in 1209 B. Æ. was evidently trumped up. Had the wife been in possession at that time under the *kabeennameh*, her husband (the son) would have objected on her account, not for himself as donee of the property from his

father. Thus then it appears evident that the property did not belong to the husband at the time of writing the *kabeennameh*; and, *secondly*, that the wife was not in possession in 1216 B. Æ. The claim therefore is invalid on the *kabeennameh*, and of consequence on the *hibbch*, or gift.

Appeal dismissed with full costs.

THE 1ST JULY 1848.

PRESENT :

ABER. DICK, Esq.,

JUDGE.

CASE No. 177 OF 1846.

*Regular Appeal from a decision passed by Ræe Lokenath Bose,
2d Principal Sudder Ameen of Jessore.*

PRANNATH CHOWDHREE, FOR HIMSELF, AND AS GUARDIAN OF CASHEENATH CHOWDHREE, DEBNATH CHOWDHREE, AND DOMANATH CHOWDHREE, MINORS, APPELLANTS, (DEFENDANTS,)

versus

ISSHUR CHUNDUR RÆE, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellants—J. G. Waller and Hamid Russool.

Wukeel of Respondent—Gholam Sufdur.

APPEAL laid at Company's rupees 5,855, for possession on 500 *biggahs* in *chuk* Punda Leyhalee, *turf* Hujra Khattee, *pergunnah* Mullosee. The land in question is situated on the boundaries of the estates of the plaintiff and defendant; and, on disputes arising for it, the magistrate attached it to prevent an affray, and referred the claimants to a civil suit, hence this suit. The principal sudder ameen, on reference to the police officer's map of the spot, and to a former suit for lands adjoining, in which a map was drawn of the country around, and evidence taken incidentally regarding the boundary between the two estates of plaintiff and defendant, deemed the plaintiff to have established his right, and decreed his claim.

The appeal objects to the decision of the principal sudder ameen, because no new local inquiry was instituted,—the former one on which he has relied, being insufficient and unsatisfactory; and prays that the case be remanded for a more full investigation.

The decision in this case turns on one point only, which is the issue,—the existence or not of a *khal*, or inlet, in 1244 B. Æ., or 1817, when the spot in question was noted in a measurement of plaintiff's estate by the collector, and its boundaries recorded. The appellant has not produced any evidence to shew that it was

in existence at that time ; or that if it were, it was ever designated by the name that is stated in the collector's papers. On the other hand, the map drawn of the ground itself, and of that all around adjoining, in the suit referred to by the principal sudder ameen, evinces that no *khal* of the kind existed even some years after, that is in 1243 B. Æ., or 1836. Besides, the incidental evidence given in that case, proves that the land in question could not have belonged to appellant's estate.

Appeal dismissed with full cost.

THE 3D JULY 1848.

PRESENT :

R. H. RATTRAY, and

ABER. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 198 OF 1847.

*Regular Appeal from a decree passed by the Judge of Purneah,
David Pringle, Esq., February 26th, 1847.*

GIRDHAREE DAS, APPELLANT, (DEFENDANT,)

versus

MUHA RAJA ROODUR SINGH AND CHARLES PALMER,
RESPONDENTS, (PLAINTIFFS.)

Wukeels of Appellants—Ameer Ali and Neelmunnee Banerjee.

Wukeels of Respondents—J. G. Waller and Gholam Sufdur.

THIS suit was instituted by respondents, on the 29th December 1845, to recover possession of 10,406 *biggahs*, 11 *biswas* of land, belonging to *mouzah* Jankeenuggur and *puttee* Mudhoobun, &c., valued at Company's rupees 1,56,098-4 ; with *wasilat*, or mesne proceeds, principal and interest, amounting to Company's rupees 69,933-12 : total estimate Company's rupees 2,26,032.

The judgment appealed against will be found amongst the printed decisions of the zillah court of Purneah of the 26th February 1847.

The plaint sets forth, that in *mouzahs* Jankeenuggur, Srinuggur, and *puttee* Mudhoobun, in zillah Beernuggur, *pergunnah* Dhurm-pore, the property of the plaintiffs (respondents) now leased to Charles Palmer and others, there are 3,503 *biggahs*, 14 *biswas* of *lakhiraj* land, the property of the defendant (appellant) Girdharee Das ; who, at the time of its measurement, preparatory to enquiry into the title, by undue means, included 13,910 *biggahs*, 5 *biswas*

in the same; on which plaintiff having appealed to the special commissioner, there was finally decreed by that court to Government, *biggahs* 3,503-14, and the excess relinquished, being shewn to belong to *mouzahs* Chandpore Bungha, Nolakee, Ekraha, and others, in *zillah* Beernuggur, settled in perpetuity with plaintiff; the mesne profits being thus ordered to be refunded to the party in possession, that is to plaintiff; but defendant, the *lakhirajdar*, having got a summary order from the criminal court under Act 4 of 1840, maintaining him in possession, in collusion with co-defendant, refused to surrender the same to plaintiff.

The answer states, that plaintiff has not given the boundaries of land claimed, which already exceeds the settlement made with him; this being the case in every village he holds, as shewn by the decennial settlement papers: whence then were 10,000 *biggahs* to come, that he should be so dispossessed? and as to its release by the special commissioner, no enquiry as to what plaintiffs held was made on the occasion of that settlement. Above all, as defendant has had possession of these lands from time out of date, any enquiry into plaintiffs' claim is now barred. Were it *toufeer*, or in excess, it would belong to the State; but relinquished as it was, and defendant's possession proved, how can plaintiff be entitled to it? The special deputy collector's enquiry proved the whole to be rent-free; while the special commissioner distinctly states in his decree, that no order will issue as to possession of land relinquished. The demand moreover is excessive, as the actual collections shew; and Government should have been a defendant in the action.

It is not necessary to go further into the case, than to record the fact of the *zillah* judge's decree having been necessarily based upon that above alluded to (passed by the special commissioner on the 8th March 1842), by which a previous decision by the special deputy collector (of the 28th January 1838,) had been reversed. When the present appeal was prepared, proceedings were pending in the special commissioner's court upon a review of the former decree (of the 8th March 1842), and the disposal of the appeal was postponed, on petition, till the result of those proceedings should be known. On the 8th of June (last month) the decree of the special commissioner (of 1842), was set aside, and that of the special deputy collector (of 1838,) upheld and affirmed. This appeal then came in due course; and was brought before a full Court by the presiding judge (Mr. Rattray), with a view to a reversal of the *zillah* decision, as a necessary consequence of the proceeding just mentioned. The Court's judgment supplies the rest.

We find that the quantity of land resumed in the first instance by the special deputy collector was 13,910 *biggahs*, held under a *lakhiraj* grant. In appeal, the special commissioner, Mr. Moore, modified the decision of the special deputy collector, and resumed

only 3,503 *biggahs*. The remaining 10,407 *biggahs* were claimed by respondent as zemindar ; and, in the suit now before us in appeal, he obtained a decree for the same with mesne profits. Subsequently, the order of Mr. Moore was brought under review, and set aside by Messrs. Jackson and E. Currie, (special commissioner) and the decision of the special deputy collector, resuming the whole 13,910 *biggahs*, affirmed, on the ground of the original grant having included that entire quantity within the boundaries laid down. In this case, the zillah decision having been based upon that of Mr. Moore in the special commission court, it is evident that the latter having been set aside, the zillah judgment must be cancelled. We reverse that judgment accordingly ; dismissing the claim of respondents, who will be charged with the costs of both courts.

THE 4TH JULY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 72 OF 1847.

Regular Appeal from a decision passed by Raee Hurchundur Ghose, Principal Sudder Ameen of 24-Pergunnahs, November 5th, 1846.

MUSST. SOLUCHNA, WIDOW OF RAMMANIK SIRCAR,
APPELLANT, (PLAINTIFF,)

versus

MRS. HELEN HARRIS, (WIDOW OF MR. FRANCIS HARRIS,)
AND MR. DAVID ANDREWS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Taroke Chundur Raee.

Wukeels of Respondents—Pursun Komar Tagore and J. G. Waller.

SUIT laid at 7,874 rupees, 10 annas, 10 pie.

The plaintiff sets forth that Rammanik Sircar, the husband of the plaintiff, made a disposal of his property by will, and appointed Francis Harris, Peter Andrews and Henry Graham his executors. By his will he made sundry bequests, and left to his widow, the plaintiff, the sum of 10,000 *Sicca* rupees, being the moiety of a Government promissory note for 20,000 rupees, together with various articles and other property. Rammanik Sircar died in *Aghun* 1239 B. S. In *Sawun* 1240, the plaintiff sent the will and list of property to Harris and Andrews, two of the executors, then residing at Balligunge, near Calcutta: they took out probate in the Supreme Court and administered to the estate. That they carried out all the instructions of the will, with the exception of paying to the plaintiff the sum of 5,200 rupees, for which, with interest, she now sues the heirs of the executors, both of whom are dead.

There are other facts set forth in the plaint, which tend to shew that Mr. Harris was the person who really administered to the estate.

The defendant, Mrs. Harris, answered that the will had been fully carried out, and every thing due to the plaintiff under it had been paid to her. Further, that the court of the 24-Pergunnahs had no jurisdiction in the matter as probate had been granted by the Supreme Court, and she (the defendant) was not a resident in the district of 24-Pergunnahs.

The defendant, Mr. Andrews, answered that his father, Peter Andrews, had never administered to the estate, and that, consequently, no claim could be made upon him.

The principal sudder ameen, on the 5th November 1846, nonsuited the plaintiff, on the ground that he had no jurisdiction in the case. From his judgment the present appeal has been preferred.

The action cannot be maintained against the defendant Andrews. There is nothing to shew that any part of the assets of the estate of Rammanik Sircar ever passed into the hands of his father, Peter Andrews, who died in 1839, leaving Harris a surviving executor. The mere fact of Mr. David Andrews being his father's heir, is quite insufficient to charge him with the liability.

The question of jurisdiction still remains to be considered with reference to Mrs. Harris, who is shewn to have been the executrix to the will of her husband, Francis Harris.

The will of Rammanik Sircar was executed in the district of Nuddea, and was delivered to the executors at Balligunge, in the district of 24-Pergunnahs, where Mr. Harris had a hired house, which he rented up to the time of his death in 1843, his principal residence being in the district of Nuddea. His widow then removed into Calcutta, where it is proved she resided up to the period of her going to England in 1846. This suit was instituted against her on the 28th of June 1845.

The cause of action against Mrs. Harris is the obligation devolving upon her in her character of executrix to her husband's estate, to pay the debts of her husband, including any thing that might be due by him to the widow of Rammanik Sircar, to the extent of the assets received by her. This cause of action must have arisen either in the place where the obligation was assumed, which was in the Supreme Court in Calcutta, where she took out probate of her husband's will, or in that in which it was to be performed, which is the district of Nuddea, where the testator was domiciled; but even in regard to the latter point, doubts may be entertained. Mrs. Harris is in no way under the jurisdiction of the court of the 24-Pergunnahs, and the mere fact of her husband having had a hired house in it, during his life time, or of his having received the will there, after the death of the testator, is insufficient to

bring her within the jurisdiction, in the absence of any thing to show her personal liability to it.

I accordingly affirm the decree of the principal sudder ameen, with costs of both courts against the plaintiff.

THE 4TH JULY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 175 OF 1847.

*Regular Appeal from a decree passed by David Pringle, Esq.,
Judge of Purneah, February 6th, 1847.*

CHARLES REED, APPELLANT, (DEFENDANT,)

versus

RANEE PURMESSERIE AND RANEE ANAR DYE,
RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellant—A. Sevestre.

Wukeels of Respondents—J. G. Waller and A. Imlach.

THIS suit was instituted by respondents, on the 10th April 1845, to recover from appellant possession of lands, the property of respondents, mortgaged to appellant for a loan of *Sicca* rupees 16,307, laid with mesne proceeds, at rupees 1,88,306.

The decision of the zillah court is printed amongst those published for February last; and from it such preliminary remarks and statements will be taken, and here repeated, as are necessary to a thorough understanding of the case.

The plaint sets forth that respondents are proprietors of *pergunnah* Telea Ghurree, against which a decree having been obtained by one Beharree Lal Singh, appellant, then their agent, undertook its release, by payment, on this and other accounts, of 16,307 rupees, when respondents executed a mortgage of their estate in his favor, to be held by him until the amount should be recovered, principal and interest, from the profits, after payment, as thus stipulated, of 70 rupees monthly to respondents for their maintenance; that appellant has so realized a sum greatly in excess of that due by respondents, the assets being as at the time of surrender; that he has moreover, since 1241 *Fuslee*, withheld the monthly allowance of 70 rupees; and, that all respondents' efforts to obtain an account from appellant being ineffectual, they now pray that he may be required to render one, and that possession of their estate, with mesne profits realized in excess, may be restored to them.

Appellant pleads that he obtained possession of the *pergunnah* agreeably to the ranees' mortgage, and agreement of the 26th

January 1824; that, when afterwards dispossessed, he was required to furnish an account by the Sudder Court; that this, submitted in June or July 1832, exhibited a balance of rupees 98,307, as due to him on the 12th April preceding, on which the interest subsequently accruing exceeds rupees 1,50,000; that by the records of the Sudder Court from 1829 to 1832, it will be seen that above two *lacks* of rupees are due to him on this account, the estate moreover being deteriorated by injustice on the part of the public authorities; that, but for his benevolent and disinterested efforts, the ranees must long ago have perished; that they must pay down rupees 98,307 before they can redeem the estate; and that the dishonesty of the attempt to obtain it otherwise, is exceeded only by its ingratitude. To this a list of documents is subjoined, of which an extract, in detail, is given in the zillah decision.

Respondents, in reply, appeal to the terms of the original and only deed executed by them, that of the 28th (not 26th) January 1824; pleading ignorance of any other, which, if produced, must be a forgery; their seals being in possession of appellant, so that their approval of any such account as that put in by him, was manifestly impossible. They add, that appellant did not even fulfil the conditions on which the mortgage was granted, not having taken any steps whatever to obtain a reversal of the decree, which he was pledged to use his endeavours to get cancelled.

The mortgage deed was not forthcoming, a copy only being filed, and that by respondents. Appellant stated that it was already with the records of the zillah court, but it was not to be found there. A copy of the *ikrarnameli*, asserted to have been subsequently entered into by the ranees, was also filed in lieu of the original.

The purport of the mortgage deed was, that respondents were indebted to appellant for countenance and protection between the years 1217 and 1230 *Fuslee* (1810 and 1823 A. D.); that he had expended towards their maintenance the sum of 6,200 rupees, as adjusted by separate account, and further in satisfaction of a decree of court, dated 29th June 1820, rupees 10,107-13; that being precluded by the said decree from making an absolute transfer of their property, they, by this deed, mortgage the whole to appellant, *in consideration of his trouble and exertions in the above case*. Then follow the stipulations as to revenue payments, appropriation of returns, interest, &c.

The *ikrarnameli* above alluded to (a copy of which was filed by appellant) bears date the 22d November 1826; and appears to have been registered on the 27th of the same month. In a note appended to the account given in by him, it is termed the 'supplementary agreement.' It is in substance that respondents had

already pledged the estate of *pergunnah* Ghurree (?) to appellant, who had greatly exerted himself from 1217 to 1230 F., in regard to their cause while pending in the several courts, retaining an office establishment, &c., with costs incurred exclusive of the sums mentioned in the former deed (of 28th January 1824); respondents therefore agree to pay appellant, retrospectively, at the rate of 100 rupees per mensem from 1217 to 1230 F., amounting in the aggregate to rupees 18,000, which, though far from an adequate return for appellant's outlay and trouble, he was content to receive,—they, respondents, binding themselves and their heirs not to claim release of their estate until the whole be liquidated, that is rupees 16,307-13, due under the mortgage (of 1824,) with the principal sum of rupees 18,000 now acknowledged to be due, and interest upon the same at 12 per cent. per annum, in this wise—that is to say, interest on 1,200 rupees from 1217 F., at the said rate, until its liquidation; and so on, the like sum for each succeeding year, in the period mentioned: for fulfilment of which, this agreement is to be considered duly executed by respondents.

Appended to the above by the zillah judge is an extract from the account said to have been filed in the Sudder Court in 1832; being so much of it as forms the basis of appellant's claim (see printed decision, page 13.)

The following is the judgment of the zillah court, which it is impossible to abridge satisfactorily, and which consequently is given in the words of the judge who passed it.

“Of the deeds here referred to, the integrity of the first is admitted by the plaintiffs (respondents): its validity will hereafter be determined. The last they wholly repudiate, which therefore I first examine.

“There are only two constructions to be put upon this deed. It is either an agreement taken in adjustment of an account, thus closed to a date three years antecedent; or it is the acknowledgment of a balance due on such date in account current, for which and the interest accruing thereon, a second mortgage is thus effected. I will consider it in both lights.

“Of the adjustment here supposed, it is apparent, that in order to form the basis of a new transaction, it must, *first*, be specific as to amount; *secondly*, embrace all claims on that account, to the date on which concluded. But in this agreement, as explained by the account which follows, we find no indication of such settlement,—the defendant (appellant) in the latter, foregoing interest on a moiety of the period for which the deed provides, but of which abatement there is there no mention: that so viewed, constituting a claim, as adjusted, for 49,334 rupees, not 33,120, as thus made to represent. That it fails, so considered, in answering the second condition, is no less obvious; there being left, on the

date on which such settlement is concluded, a previous account of two years and ten months unadjusted.

“ The same statement, I now shew, is conclusive against this deed, regarded as an acknowledgment of amount due in account current, as thus rendered apparent, the demand so arising being there exhibited under separate accounts; one of which is closed with an abatement of interest; the other still current.

“ Nor is the contravention of the usury law here found, as contained in Regulation 15 of 1793, less remarkable, whether in the levy of compound or usurious interest, there being charged on the original debt of 18,000 rupees, 50,000 rupees, or nearly threefold the principal; while the deed throughout can only be considered as a device to evade the law, and so convert an illegal demand into a means of exacting usurious interest.

“ But with the consideration of this deed, is inseparably connected that of the original mortgage; to which the defendant is careful to shew it merely forms a supplement: without which therefore the former was incomplete; and with which it must now be pronounced invalid. Both, it is seen, are made to bear interest from the same date, though the latter was not executed for two years and ten months afterwards. The transaction according to defendant, was one and the same; by one law therefore it must be governed. But the plaintiffs have not brought their action to set aside that deed; and being now content to admit the account put in by the defendant, for the objects declared by their bill it only remains to make the following order.

“ That possession of the said property be restored to the plaintiffs, with mesne profits obtained by defendant in excess of the amount due under that mortgage, or rupees 24,612-1-9, as realized in 1239. Likewise the sum of Company’s rupees 35,399-7-4, as proved to have been paid over to defendant by an order of court, because of his dispossession, on sale of the estate in execution of a decree, thereby cancelled, but for which no credit is here given: the whole amounting with interest, on this date, to Company’s rupees two *lacks*, thirty-seven thousand, eight hundred, and sixty-two, twelve *annas*, and nine *pie*, which will bear interest till its liquidation.

“ The genuineness of the supplementary deed will form subject of separate enquiry, as not necessary to be determined before making this award. That the original, if it exists, must be a forgery, is supported, I am of opinion, by the strongest presumptive evidence. In an English petition presented to the collector on the 31st July 1830, the following postscript is found appended:—

‘ In consequence of information just received from Purneah, I represent that the ranees formerly had not seals. Some time ago, I, with the Calcutta Magistrate’s permission, had seals made

for them : these seals, with the ranees' consent, have remained in my possession, and, in their unprotected condition, it certainly would not be right to leave the seals with them, (signed) C. Reed.'

"The original, as said, is not here produced ; yet the absence of this would not bar enquiry into the fabrication of a paper so filed, under Regulation 17 of 1817. I have therefore addressed the Chief Magistrate to ascertain the history of those seals.

"As further supporting the presumption thus created, I only here add, that the original mortgage, admitted by the plaintiffs, would, from its tenor, appear to have been considered in the light of a final adjustment of all existing claims, as the words in italics by this court seem clearly to indicate."

To the principle adopted by the zillah judge in the proceedings on this case, I have no objection to offer : on the contrary, I consider the judgment passed to rest upon the best of all possible evidence, that furnished by the defendant in the suit. I believe with the zillah judge, that the *ikrarnameh*, or supplementary deed is a forgery, and that the respondents were not parties to it ; and why I believe this, is (amongst other reasons, which it is not necessary to state here) that their seal was in the keeping of Mr. Reed,—that the original deed is not filed,—that the registry of it, upon which much stress is laid, as evidencing the original concurrence of respondents and their acknowledgment of what it contains, was effected by two persons (Domun Lal and Wuzeer Ali) said to have acted under a *mokhtarnameh*, or power of attorney, executed by respondents ; but no such *mokhtarnameh* has been produced, nor was any, or any trace of any, to be found in the local office ; nor have the individuals named as having acted under the authority thus delegated, been brought forward to prove, what, under the circumstances stated, there is not a tittle of evidence to establish.

It is to be observed, that the award of the zillah court, with the interest account brought up to the date of decision, is still in excess of the amount at which the suit was laid ; and there is one item, inducing this, which ought not to have been included, if only on the score of the respondents not having sought the Court's interference to obtain it. I allude to the sum of Company's rupees 35,399-7-4, proved (says the zillah judge) to have been paid over to the defendant because of his dispossession, on sale of the estate in execution of a decree. It was paid as stated ; but the payment became the ground of a subsequent distinct action, not yet, I believe, finally disposed of : at any rate the money has not now been claimed, and cannot be adjudged. This would render it necessary to lay the case before a full Court ; but the objection would seem to have been anticipated, and respondents have at once waived all right and title to the amount.

This is the only part of the judgment of the zillah court which I consider open to correction. Deducting, therefore, this sum of

Company's rupees 35,399-7-4, with the same sum for interest, together Company's rupees 70,798-14-8, from that decreed (Company's rupees 2,37,862-12-9-16) there remains Company's rupees 1,67,063-14-1-16; the decree for which, with restoration of the estate of *pergunnah* Telea Ghurree, is hereby affirmed, with interest on the full sum from the date of the zillah decision to that of liquidation. Costs, upon the amount adjudged, to be paid by appellant.

I deem it proper to add a few words with respect to the relinquishment by respondents of the sum above deducted from the amount decreed by the zillah judge, and the consequent disposal of the case without submitting it to a full Court. The proceeding has been adopted upon precedent, conferring a competency, which, in the absence of such authority, I should not have assumed, certainly not without taking the sense of my colleagues on the question, which, with reference to what follows, became unnecessary.

In the case of Syudanee Ruhman Bibi, appellant, *versus* Kishun Mohun Shah, respondent, decided by Mr. Tucker on the 19th June 1841, the zillah court had adjudged interest on mesne profits decreed to respondent from a date prior to that of the institution of the suit, from which latter date only it was considered by the Court that interest could be justly allowed, and it became necessary to submit the case to another judge; but on the *wukeel* of the respondent waiving all claim to interest for the antecedent period, the deduction was made, and the appeal disposed of without further reference.

In the case of Govind Lal Race, appellant, *versus* Usdun-o-nissa Bibi, respondent, decided by Mr. Dick on the 28th April 1847, the zillah court had adjudged 500 rupees as the estimated value of certain personal effects, which it was the opinion of the judge (Mr. D.) ought not to have been decreed. The claim was withdrawn; and the zillah decision was affirmed as regarded the remainder of the property, without further reference.

There are others, involving a relinquishment of portions of the amount claimed and adjudged in the lower courts; and, besides these, a great many in which costs *decreed* have been resigned by parties, and deducted by single judges on a final disposal of the appeal, which otherwise had been open to a general revisal by a full Court. I will merely add one more of the former class, in proof of having myself, heretofore, acted similarly to my colleagues upon assumed competency. In a case, (Doodraj Singh and others, appellants, *versus* Imrut Lal, respondent,) decided on the 23rd January 1847, amongst other items of family property to be adjudicated, were certain boys and girls, slaves, half of whose number had been decreed, with the other animals, &c., of the estate, to the respondent (plaintiff in the suit). With advertence to Act 5 of 1843, I refused to affirm this portion of the decision; and was about to

order the case to be laid before a full Court, when the respondent relinquished the claim, and, *minus* the slaves, the zillah judgment was upheld without further reference.

Any thing required in regard to the enquiry under Regulation 17 of 1817, mentioned at the conclusion of the zillah decision, will be made the subject of a separate proceeding.

THE 5TH JULY 1848.

PRESENT:

ABER. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 51 OF 1846.

Special Appeal from a decision passed by Moulvee Abool Khyr Mohummud Ali, Principal Sudder Ameen of Tipperah, August 8th, 1844; confirming a decree passed by Jonab Ali, Moonsiff of Begumgunge, April 22d, 1844.

MEHR-O-NISSA, APPELLANT, (PLAINTIFF,)

versus

RAJUB-O-NISSA, RESPONDENT, (DEFENDANT.)

Wukeel of Appellant—Gholam Ahmud Khan.

Wukeel of Respondent—Ameer Ali.

THIS case was admitted to special appeal, on the 29th January 1846, under the following certificate recorded by Mr. Jackson:—

“The principal sudder ameen, confirming the moonsiff’s order, dismisses the claim on the ground that above 12 years has elapsed since the origin of the case, viz. that Kureem-o-nissa died in the year 1232, and the suit was laid for a portion of the property left by her, on the 19th September 1843; moreover, that the plea of intermediate minority has not been made out. The plaintiff files copy of an order of the judge, dated 6th January 1832, on a report of Radhanath, *mohurri*, directing ‘that the guardian of the plaintiff be relieved from her charge.’ The plaintiff was therefore under a guardian till that date; and from 6th January 1832 to 19th September 1843, 12 years has not expired. To try the point whether the action was barred by the rule of limitations, due regard being given to the minority of the plaintiff.

MR. DICK.—The Court are of opinion that the suit is not barred by the law of limitation, as the plaintiff cannot be considered to have attained her majority until the date of the order of the court removing her guardian. The case is therefore remanded for re-trial on its merits.

MR. JACKSON.—I agree in the above order. The plaintiff could not come into court in person until she was relieved of her state of tutelage, by the removal of the guardian appointed by the court. The 12 years must count from the date of the order removing the guardian.

MR. HAWKINS.—I concur.

THE 5TH JULY 1848.

PRESENT :

ABER. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 25 OF 1846.

Special Appeal from a decision passed by Moulvee Abool Khyr Mohummud, Principal Sudder Ameen of Tipperah, August 8th, 1844; confirming a decree passed by Jonab Ali, Moonsiff of Begumgunge, April 22nd, 1844.

MEHR-O-NISSA, APPELLANT, (PLAINTIFF,)

versus

RAJUB-O-NISSA AND OTHERS, RESPONDENTS, (DEFENDANTS.)

THE grounds for the admission of the special appeal in this case are the same as those recorded in the preceding case (No. 51 of 1846.)

The Court are of opinion, that the plaintiff had not incurred the penalty of being barred from suit from lapse of time after attaining majority, as that must count from the date of the order of court removing the guardian. The suit is therefore remanded for trial on its merits.

THE 5TH JULY 1848.

PRESENT :

ABER. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 142 of 1842.

*Regular Appeal from a decision passed by the Principal Sudder
Ameen of Midnapore.*

SREENATH MITR, PAUPER, APPELLANT, (DEFENDANT,)

versus

RANEE KISHEN PEEREEA, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—None.

RESPONDENT sued the appellant and others for balance of rent due on a *mouroosee ijara, junglebooree*, or heritable jungle clearing lease for the years 1235 to 1247, inclusive, after deducting sundry payments made during that period. The appellant denied that any balance was due; and in proof filed, among other receipts, a receipt given by Rajah Roodur Nurain in 1247, in which is an admission of there remaining no balance due for former years.

The principal sudder ameen considered this document invalid, and the original contents erased, and new inserted. On which account, and on its being very irregular and contrary to custom, and unsupported by any other corroboratory document evincing an examination and casting up of accounts, rejected it, and decreed the principal with interest to an equal amount of what seemed due, after deducting the sums admitted as paid by respondents.

The appellant preferred this appeal, pleading that the respondent ought to have sued yearly for any balance due, and not have held back for 13 years; that the receipt of Roodur Nurain, rejected by the principal sudder ameen, was perfectly regular and according to custom; and that if any erasures, or besmearing, or other cause of suspicion be now apparent on it, that has been done collusively with respondent since it was filed in court, &c.

The receipt filed by appellant, and on which he rests his defence and appeal, is on unstamped paper, and therefore invalid and inadmissible by the courts. It is therefore rejected; and the principal only of the rent due (within 12 years from date of suit) by appellant, was awarded, because the respondent had the privilege of suing yearly and summarily for arrears; by neglecting to do so, and delaying his suit for so long a period, he has justly forfeited the interest. Costs in proportion to amount awarded, and interest on that amount from date of suit till payment.

THE 5TH JULY 1848.

C. TUCKER, Esq.,

JUDGE.

PETITION No. 445 OF 1846.

IN the matter of the petition of Sheo Purshad Bhuggut, filed in this Court on the 11th March 1848, praying for the admission of a special appeal from the decision of Captain John Hannyngton, deputy commissioner of zillah Kishenpore, Chota Nagpore, under date the 21st April 1846; reversing that of Captain Richard Ouseley, principal assistant, under date the 21st June 1843, in the case of Chowdhree Muhabeer Singh and others, plaintiffs, *versus* Sheo Purshad Bhuggut, defendant.

This was a petition for a review of a previous order, dated 16th September 1847, rejecting the application then before the Court, for a special appeal in this case; and which I have considered it right to allow.

The suit was brought to recover possession of four villages, together with surplus collections thereon to the extent of rupees 9,709-4-13, (principal and interest) and for restitution of three *kubalas*, or bills of sale, lodged with the uncle of the defendant, Munoke Bhuggut.

The plaintiffs are sons of one Chowdhree Birj Bhookun Singh; and in their plaint they state, that their father, conjointly with Chowdhree Munpoorun Singh, Chowdhree Gundowree Singh and Koonwur Oodyenath Singh, purchased the four villages in question from different parties in the year 1857 *Sumbut*, for *Sicca* rupees 2,813, under three *kubalas*.

That after five or six years' undisturbed possession of the same, one Munoke Bhuggut, a *muhajun*, to whom their father was indebted in the sum of rupees 2,905, began to press for his money; and that their father obtained the consent of his co-purchasers to mortgage the four villages in question to Munoke Bhuggut, until the debt should be discharged from the usufruct. That Munoke Bhuggut assenting to this arrangement, said there was no necessity to draw out any fresh title deeds; but that if the four pur-

chasers would transfer the three *kubalas* to him, under their respective signatures, in the form of an out and out sale, he, on his part, would execute an engagement, pledging himself to restore the villages so soon as the debt should be discharged from the collections; from which nothing save the Government revenue was to be deducted. That the three *kubalas* were accordingly so endorsed and made over to Munoke Bhuggut, apparently as an unconditional sale for the sum of rupees 2,905; and an *ikrar* of the purport abovementioned was executed by Munoke Bhuggut, in the name of, and given to their father. The endorsement on the *kubalas*, and the *ikrar* are dated 2d *Assar* 1864 *Sumbut*, which corresponds with the 22d June 1807.

The plaintiffs then go on to state, apparently with the view of accounting for the delay in bringing this suit, which was filed on the 3d September 1840, that shortly after the above transaction their father became insane; and that much time was spent in looking after him, and in endeavouring to restore him to sanity, but to no purpose; and that at length they were obliged to assume charge of his affairs, and, as the debt to Munoke Bhuggut had long since been fully liquidated, to institute this suit to compel him to restore the villages, which he refused to do. They further stated that the co-sharers had since been paid (some by their father and some by them) their share of the original purchase money, so that the property in the four villages now vested exclusively in them, the plaintiffs. The account made out by the plaintiffs is as follows:—

Gross assets of the four villages from 1864 } <i>Sumbut</i> to 1896,	19,392	8	0
Deduct Government revenue from do. do.,...	4,298	4	0
	15,094	4	0
Deduct due to Munoke Bhuggut to do.,.....	8,957	4	0
	6,137	0	0
Interest on balance,	3,572	5	0
Sa. Rs..	9,709	5	0

This statement was positively denied by the defendant, the nephew and heir of Munoke Bhuggut, who pleaded an unconditional sale; and urged the great improbability, that with such a document as Munoke Bhuggut's pretended *ikrar* in their hands, the plaintiffs should allow him and his uncle to retain possession of the villages so many years after the debt had been discharged from the usufruct, without ever preferring their claim.

The principal assistant dismissed the claim; but on appeal the deputy commissioner decreed for the appellants, on two grounds:—

first, that the *ikrar* was proved by the attesting witnesses as well as the writer of it; *secondly*, that the endorsement on the back of the *kubalas* was not a legal transfer.

On both these points I find it necessary to admit a special appeal. With regard to the first, I find the evidence of the witnesses were not taken by the court in the presence of the parties, but copies of some depositions made by them, in a case pending before the collector in 1839, were filed by the plaintiffs; and on these copies so filed, the court decided as to the *ikrar*.

With regard to the second point, we have the mere assertion of the deputy commissioner unsupported by a single argument. The deputy commissioner should have shown that either by the custom of the country, or by the Regulations of the Government in force at the date of the endorsement, such a mode of transferring property was held to be of no effect; but, as before remarked, there is no attempt to support the assertion by argument or precedent. There are other reasons for which I deem the deputy commissioner's proceedings incomplete, and insufficient to overrule the decision of the principal assistant.

There is no attempt to explain the extraordinary delay in bringing this suit. At the plaintiffs' own valuation, the debt should have been discharged in eight years from the collections; but the villages were allowed to remain in Munoke Bhuggut's possession for 33 years before this suit was brought. Again, it is a matter requiring explanation, why the *ikrarnameli*, bearing the same date as the endorsement on the back of the three *kubalas*, was not attested by the same witnesses, and why the *ikrarnameli* was in the name of Brij Bhookun Singh, only, when the interests of his co-purchasers in the four villages required protection as well as his own.

Having admitted the special appeal on the two points of law just noticed; and the error of receiving as evidence copies of depositions made before another tribunal by persons still in existence (for any thing shewn to the contrary on the record), having originated in the principal assistant's court, I annul the decision of the deputy commissioner, and remand the proceedings to the principal assistant, who will give the plaintiffs the opportunity to summon the attesting witnesses, and the writer of the *ikrarnameli*; and should their attendance be procured, he will take their evidence *de novo* in presence of the parties to this suit, or of their duly constituted *wukeels*. He will also afford them an opportunity of producing any evidence they may have, oral or documentary, to explain the points above alluded to (as calling for explanation) and then dispose of the case; allowing, however, to the defendant an opportunity to rebut any new evidence which the plaintiffs may adduce under the above permission.

Under the orders of Government, No. 896, dated 19th May 1848, the first, or regular appeal from cases valued at 10,000 Company's rupees and upwards, which may be heard and determined in all the non-regulation districts, by whatever authority, lies to the Court of Sudder Dewanny Adawlut. The principal assistant therefore will inform the losing party in his court, that if they deem themselves aggrieved by his decision they are at liberty to appeal direct to this Court.

THE 5TH JULY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 132 OF 1848.

IN the matter of the petition of Petumber Ghose, filed in this Court on the 27th April 1848, praying for the admission of a special appeal from the decision of Ramlochun Race, principal sudder ameen of zillah Nuddea, under date the 28th January 1848; reversing that of Gour Mohun Biddya Sunkur, moonsiff of Meherpoor, under date the 29th July 1847, in the case of Petumber Ghose, plaintiff, *versus* Hurnath Banerjee, *gomashlah* of Mr. James Hill.

This was a suit instituted by the petitioner on the 4th February 1846, to set aside a summary decision of the collector of Nuddea, dated 16th January 1844. The case was decreed by the moonsiff; but, on appeal, was thrown out by the principal sudder ameen, because it was not brought within one year from the date of the collector's decision. The circumstances attending the delay in bringing the suit were stated, but were not considered by the principal sudder ameen sufficient. They are as follows. The petitioner appealed from the collector's decision to the commissioner of revenue, who reversed the collector's orders. The plaintiff, in the summary suit, then appealed to the Sudder Board of Revenue, who annulled the commissioner's orders; and these orders were communicated to the collector by the commissioner on the 7th February 1845. When the petitioner was made acquainted with this fact, does not appear; but, at all events, up to 7th February 1845 he had no grounds for a suit in court, the collector's decision, up to that date, standing cancelled. The present suit was brought 4th February 1846; and yet the principal sudder ameen threw it out, because not filed on or before 16th January 1845, at which time he had positively no cause of action. I therefore admit a special appeal; and under the provisions of Clause 2, Section 2, Regulation 9, 1831, remand the proceedings to the principal sudder ameen, who will restore the appeal to his file, and dispose of it on its merits.

THE 5TH JULY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 950 OF 1846.

IN the matter of the petition of Musst. Umul Husnaut, filed in this Court on the 19th December 1846, praying for the admission of a special appeal from the decision of Henry Brownlow, Esq., judge of zillah Cuttack, under date the 14th September 1846; affirming that of Tarakunth Bidyasagur, principal sudder ameen of the said zillah, under date the 24th September 1845, in the case of Musst. Umul Husnaut, plaintiff, *versus* Muddoo Soodun Sahoo and Moulvee Abdool Ahid, defendants.

A full report of this case will be found at pages 8 and 9 of the monthly decisions for zillah Cuttack, for the year 1846.

The decisions of the lower courts in this case are admitted to be against the evidence, documentary and oral; and in remanding the proceedings for further enquiry, I would not be understood to dispute the right of the courts to do so; but I conceive that in all such cases, it behoves the Court to proceed on some tangible grounds supported by evidence on the record.

In this case the courts below are impressed with the idea, that the plaintiff and the defendant, Moulvee Abdool Ahid, her husband, have conspired together to defraud the other defendant, Muddoo Soodun Sahoo; and they do not believe the assertions of the plaintiff, or the admissions made by her husband. But letting alone that, there does not seem to be any adequate motive for the alleged collusion between the plaintiff and her husband, inasmuch as the husband must, under the course adopted, inevitably refund to Muddoo Soodun Sahoo the amount purchase money received by him from that person. The courts have not made that full and patient enquiry into the truth, or otherwise, of the statement of the plaintiff, which, if true, might very probably remove the suspicion of collusion between husband and wife entertained by the court. I refer to the history given by the plaintiff of her disagreement with her husband since his second marriage, and the attempts made by him to injure her and her children for whose future benefit this very property is alleged to have been purchased.

I know it is the duty of parties to place such evidence as they deem it to their interest to adduce before the court; but this is applicable only to those points which the courts under Section 10, Regulation 26 of 1814, may think fit to call upon the parties to establish.

It cannot fairly be imputed as neglect on the party, who may not adduce evidence on any other point not laid down in the court's proceeding. It is here I deem the proceedings of the lower courts deficient and incomplete; and, to remedy this, I admit the special appeal and remand the proceedings under the provisions of Clause 2, Section 2, Regulation 9, 1831, to the court of the principal sudder ameen, who will give the plaintiff an opportunity of establishing by evidence the statement contained in her plaint of the conduct of Moulvee Ahdool Ahid, towards herself and her children, and then dispose of the case *de novo*.

THE 6TH JULY 1848.

PRESENT :

SIR R. BARLOW, BART.,
JUDGE.

CASE No. 16 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Jessore, September 10th, 1846.

RANEE KUTEEANEE, APPELLANT, (PLAINTIFF,)

versus

RAM RUTTUN RAE AND OTHERS, AND GOOROO DAS
RAEE AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellant—Gholam Sufdur and Pursun Komar Tagore.

Wukeels of Respondents—J. G. Waller, Rampran Raee, Bunsee Buddun Mitr, and Gobind Chundur Mookerjee.

THE appellant on the 14th April 1846, or 3d Bysack 1253, sued the respondents for arrears of rent on 22 *khadehs*, 8 *pakees*, 14 *kanees* of land, situate in her zemindaree *pergunnah* Nuldee, from 1242 to the 16th *Poose* 1249, at 228 *Sicca* rupees, 8 *annas* per annum, being 1,761 *Sicca* rupees, 5 *annas*, 13 *gundahs*, with interest thereon 1,498 *Sicca* rupees, 7 *annas*, 6 *gundahs*, amounting to 3,259 *Sicca* rupees, 12 *annas*, 19 *gundahs*; and also for rents from the 17th *Poose* 1249 to the close of 1252 on the same lands, at 589 *Sicca* rupees, 1 *anna*, 11 *gundahs*, (after assessment made on them under a decretal order of the courts below, confirmed by the Sudder Dewanny Adawlut,) being 1,937 *Sicca* rupees, 4 *annas*, 13 *gundahs*, with interest 375 *Sicca* rupees, 11 *annas*, 14 *gundahs*, amounting to 2,313 *Sicca* rupees, 1 *anna*, 7 *gundahs*; estimating her action at 5,572

Sicca rupees, 13 *annas*, 6 *gundahs*, or 5,944 Company's rupees, 6 *annas*.

The respondents, Ram Ruttun and his brother, claim exemption from the demand, on the plea that Gooroo Das and his brother, and their father, were in possession of the lands as shewn by former decisions of the courts.

The respondents, Gooroo Das and Ram Rungonee, urge no objection to the *jumma*, or to the rents sued for; but plead that the plaintiff had already recovered from their guardian 13,620 *Sicca* rupees under summary decrees, the refund of which, though it had been ordered by the Sudder Dewanny Adawlut, up to the present date has never been made; that she might have realized her rents from the last mentioned sum if she thought them due; and that interest after the lapse of so many years cannot be allowed. Other pleas are also brought forward, which however are not material to the issue of the case.

The principal sudder ameen does not consider the plaintiff entitled to the interest she claims, as the plaintiff has not proved she ever demanded her rents, which she might have received monthly, if she had asked for them. He exempts Ram Ruttun Raee and his brother, on proof that they were not in possession of the land in 1242; and charges Gooroo Das and Ram Rungonee for that year, as well as from 1243 from which period they admit they were in occupation. He decrees the principal without the interest sued for (*i. e.* 3,698 *Sicca* rupees, 10 *annas*, 6 *gundahs*) against the last mentioned parties, with interest thereon from date of plaint at 12 per cent., and interest on amount of decree from date.

The plaintiff at the present moment holds a sum of money, made (on the 25th *Maugh* 1240, or 6th February 1834) by this Court payable by her to the defendants, (respondents.) The allegation, therefore, that they are in balance to her for rents from 1242 to 1249 is altogether incorrect; of course, under such circumstances, no interest can be charged. The appellant is at liberty to realize the amount principal, without interest, awarded by the principal sudder ameen, with interest from date of his decree.

The appeal is dismissed with costs.

THE 8TH JULY 1848.

PRESENT:

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,
JUDGES.
J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 402 OF 1847.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Patna, June 26th, 1845; reversing a decree passed by the Moonsiff of the Western Division, December 31st, 1840.

PURSHAD SAHOO AND RAMNATH SAHOO, APPELLANTS,
(PLAINTIFFS,)

versus

MOONSHEE RAHUT ALI AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellants—Kishen Kishore Ghose.

Respondents in person.

THIS case was admitted to special appeal, on the 25th February 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘ The petitioners (appellants) sued for possession of 3 *pie milkeet* and 2 *annas moocurrurree* of *mouzah* Asoopoor, purchased by their father, Hem Sahoo, from Dyem Ali and Kuramut Ali, on 10th *Assin* 1241 F. The principal defendant (Rahut Ali) pleaded a previous purchase from Kuramut Ali in 1229 F. Kuramut Ali and Dyem Ali admitted the sale to Hem Sahoo. The case was tried first by a moonsiff, who gave decision in favor of the plaintiffs; but the defendant, Rahut Ali, induced the moonsiff to ask permission of the judge to review his judgment, which was granted. The result, however, was the same: the moonsiff adhered to his *first* opinion, and decreed for the petitioners. It was proved that in 1229 F., the period of the alleged sale to Rahut Ali by Kuramut Ali, the property belonged to and was in possession of Musst. Fusseeah, Kuramut Ali’s mother, who on the death of her husband, Sheikh Mojeeboollah, in *Sawun* 1222 F., had succeeded to his property in virtue of her dower. This was incontestably proved by copies of three decrees put in by the petitioners. In one Sheo Churn and Kurrum Chund were plaintiffs against Kuramut Ali and Dyem Ali, for the possession of 2 *annas* of the *milkeet* and 2 *annas* of the *moocurrurree* sold to them by Musst. Fusseeah, in which they obtained a decree. In the second Hem

Sahoo was the plaintiff, against the same defendants, for the same property; which, after the first decree, was sold to Hem Sahoo by Sheo Churn and Kurrum Chund. In this case, amongst other things, it was pleaded by the defendants that their mother, Musst. Fusseeah, never had possession of the property in virtue of her dower, and had no right to sell any part of it. The decree in this case confirms the sale of Musst. Fusseeah, as the rightful owner and possessor of the property at the time the sale was made. In the third case a daughter of Musst. Fusseeah was plaintiff against Kuramut Ali, Dyem Ali and the present petitioners; and her claim was to have the share which was her due as the daughter of Mojeeboollah. The case was dismissed, on the grounds that Musst. Fusseeah had succeeded to the property in virtue of her dower, and had disposed of the greater part of it during her life time, and the same had been transferred from one to another subsequently. Now, it is not denied that Musst. Fusseeah died in 1237 F. Rahut Ali's alleged purchase from Kuramut Ali is dated in 1229; and yet, in the face of the three cases above quoted, the principal sudder ameen, who tried the appeal in this case, overruled those three cases, and refused to acknowledge them as establishing the right of property and possession of Musst. Fusseeah, and reversed the moonsiff's decree, and confirmed the sale from Kuramut Ali (only one of the sons of Sheikh Mojeeboollah) to Rahut Ali in 1229 F.

‘I admit a special appeal—

First, because no Regulation or Act that I am aware of authorizes the judge to permit a moonsiff to review his judgment. The second decree is therefore a nullity, and from the first there has been no appeal.

‘*Secondly*, that although Rahut Ali was not a party to the three decrees above noticed, I think the principal sudder ameen was bound to acknowledge them as establishing the right of property and occupancy being vested in Musst. Fusseeah, in which case he could not recognize the sale to Rahut Ali by Kuramut Ali in 1229 F.’

On the first point referred to us in the above certificate, we are of opinion that the proceedings held subsequent to the first decision of the moonsiff, are all void of legal efficacy; and that the fact of the moonsiff having adhered to his first decision, will not allow us to countenance and pass over an actual illegality; the more so as we find that, after receipt of the judge's permission to review his judgment, a supplementary plaint was filed by the plaintiffs, including mesne profits, (which were not included in the first plaint), which in a moonsiff's court is prohibited by law. We therefore annul all the proceedings held subsequent to the first decision of the moonsiff, dated 28th May 1838, from which decision the defendant, under the circumstances, may be allowed

to prefer an appeal within one month from the date of the arrival of this decree in the court of the principal sudder ameen.

On the second point noted in the certificate, we deem it right to record our opinion, that in case of an appeal being preferred no misapprehension may arise calculated to fetter the judgment of the appellate court. After a careful consideration of the question, we are of opinion that if Rahut Ali can establish his statement to the satisfaction of the appellate court, and can show that he has held possession of the contested property since his purchase in 1229, then and in that case the previous decrees, referred to in the certificate, and to which Rahut Ali was not a party, will form no obstacle to his obtaining a decree on the suit of the present plaintiffs, purchasers from Kuramut Ali and Dyem Ali.

- We accordingly remand the proceedings to the court of the principal sudder ameen, who, in the event of an appeal being preferred in conformity with the tenor of these orders, will proceed to try it on its merits *de novo*. Costs of this appeal to be charged to the appellants.

THE 8TH JULY 1848.

PRESENT :

C. TUCKER, Esq.,

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 337 OF 1847.

Special Appeal from a decision passed by the Judge of Zillah West Burdwan, December 18th, 1845; confirming that of the Principal Sudder Ameen of that district, September 14th, 1844.

GUNGAPURSHAD GHOSE, APPELLANT, (PLAINTIFF,)

versus

JOYCHAND PAUL, CHOWDHREE, RESPONDENT,
(DEFENDANT.)

Wukeel of Appellant—E. Colebrooke.

Wukeel of Respondent—Bunsee Buddun Mitr.

THIS case was admitted to special appeal, on the 24th June 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘ In this case the petitioner (appellant) sued the defendant for a balance of account as per his *khatta-bye*. The transactions between the parties embraced a period of 14 years, from 1232 to

1246 B. S., when an adjustment is said to have taken place in the presence of the *gomashtahs* of both parties. The courts below have dismissed the claim, because the defendant was a minor till the year 1240 B. S.

‘I admit the special appeal to try in the first place, whether the continuation of the money transactions between plaintiff and defendant, for six years after the latter came of age, does not bar the plea of minority. If the Court be of opinion it does, it may then be necessary to remand the case for investigation of the accounts.’

On reference to the proceedings, we find the courts below have not confined themselves to the point of minority; but that the judge in particular has gone into the evidence on the whole case, and dismissed the claim for want of proof. We therefore see no grounds for interfering with his decision, which is accordingly affirmed, and the appeal to this Court dismissed with costs.

THE 8TH JULY 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 191 OF 1847.

Special Appeal from a decision passed by the Additional Judge of Zillah Hooghly, June 26th, 1845; reversing that of the Principal Sudder Ameen of that District, March 7th, 1843.

JOYKISHEN MOOKERJEE AND RAJKISHEN MOOKERJEE, APPELLANTS, (PLAINTIFFS,)

versus

MR. JOHN WATSON, RESPONDENT, (DEFENDANT.)

Wukeels of Appellants—Ramapurshad Raee and Shib Nurain Chatterjee.

Wukeel of Respondent—Pursun Komar Tagore.

THIS case was admitted to special appeal, on the 11th March 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘In this case the petitioners (appellants) purchased at a public sale, made for the recovery of arrears of Government revenue, lot Reedyerampoor in 1837 or 1838, A. D. (not clearly ascer-

tained which). *Mouzah Hijlee* appertains to lot Reedyeram-poor; and finding that an embankment which the principal defendant (who has an indigo factory in the neighbourhood) was erecting, or had erected therein, was very injurious to the general cultivation, they applied to the *foujdaree* court to interfere, and stop the progress of the embankment; but obtaining no redress they instituted the present suit on 9th February 1841, for the removal of the embankment.

'The principal sudder ameen gave them a decree; but on appeal the additional judge threw the case out under the statute of limitations. It appears that in the year 1828, A. D., a dispute arose between the *ryuts* of another village (not Hijlee) and the proprietor of the indigo factory regarding an embankment, which brought the matter into the *foujdaree* court; and on 2d April of that year, the magistrate ordered that the embankment should not be touched.

'On this order the additional judge, assuming the present embankment to be the same with that referred to in the proceedings of the *foujdaree* court of 2d April 1828, ruled that as it had been in existence upwards of 12 years before the present suit was brought, the action would not lie, and as before stated threw out the suit. I am of opinion, this is an illegal extension of the statute of limitations to the present suit.

'It is to be observed the dispute of 1828 was between the *ryuts* of another village, and the then proprietor of the indigo factory. The zemindar of the time being, or proprietor of the land, was no party to the proceedings. Further, the present plaintiffs are purchasers at a public sale made for the recovery of arrears of Government revenue, and brought the present suit within 3 years of their purchase, having from the first objected to the embankment. With respect to them, therefore, surely the statute of limitations cannot be considered to preclude a decision on the merits of the plaint preferred by them. On the merits of the case the principal sudder ameen decided in the petitioners' (appellants') favor; but the judge refused to enter on the merits. I admit the special appeal to try whether the statute of limitation precludes the merits of the case being entered upon; and should the Court trying the appeal concur with me, the proceedings should be remanded to the judge, in order that the case may be disposed of on its merits.'

We are of opinion that the law of limitation does not apply to this case. The plaintiffs sued for damages sustained from the commencement of 1246 to *Maugh* 1247 B. S., in consequence of a certain embankment; and the suit was filed on the 9th February 1841, corresponding with 28th *Maugh* 1247 B. S., so that the question of limitation does not arise. But a question of prescription may arise, as to the length of time the embankment has

been in existence ; and this demands enquiry and investigation. We therefore annul the decision of the additional judge dated 26th June 1845, and remand the proceedings in order that the appeal may be disposed of on its merits.

THE 8TH JULY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 326 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Behar, Hidayet Ali Khan, April 17th, 1847.

MUHA RAJAH MUHESHUR BUKHSH SINGH, HURO-
NURAIN SINGH, BUSTEE SINGH AND OTHERS, APPEL-
LANTS, (PLAINTIFFS,)

versus

GOVERNMENT, LUCHMEE PURSHAD, MEER ABDOOL-
LAH AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Govind Chund.

Wukeels of Respondents—Pursun Komar Tagore and Hamid Russool.

THIS suit was instituted by appellants, on the 16th January 1844, to obtain the reversal of the sale of *mouzah* Russoolpore-Bhana *alias* Dukhnee Beegah, in *pergunnah* Ookree, with mesne profits from 1241 to 1250 *Fuslee* : estimated at Company's rupees 9,534-12-10.

The estate in question was the property of the appellants, Huro-nurain, Bustee Singh and others, and a portion of it was mortgaged to Munowur Ali ; the revenue of which portion falling into arrear, the whole was brought to sale and purchased by Luchmee Purshad. Three distinct objections were urged before the commissioner against the sale ; but they were deemed false or frivolous, and it was confirmed. After a lapse of 10 years, the Muha Rajah Muheshur Bukhsh was admitted as proprietor of a moiety of the estate, for the avowed purpose of bringing and maintaining this action, which, under the circumstance stated, the courts cannot take cognizance of. The suit has, of course, been dismissed.

It is no business of mine to comment upon precedents, which I am bound to follow,—it is sufficient that they exist ; and, with

reference to them, I affirm the judgment of the lower court, with all costs chargeable to appellants.

See decision of 11th August 1847, ' Syud Keramut Ali *versus* Sumbhoonath Mitr and others,' page 423 of decisions of the Sudder Dewanny Adawlut, and the precedents cited in the note appended to the same.

THE 11TH JULY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 496 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Sarun, Mohummud Rafik Khan, July 21st, 1847.

GOWREE DUT SINGH AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

BYJNATH RAE, SHEONURAIN RAE AND OTHERS,
RESPONDENTS, (DEFENDANTS.)

Wuheels of Appellants—Gholam Sufdur and Ameer Ali.

Wuheels of Respondents—Pursun Komar Tagore and i mid Russool.

THIS suit was instituted by appellants, on the 9th March 1846, to cancel the mortgage, and obtain possession of *mouzah* Luhjee, in *pergunnah* Buree, with mesne profits from 1239 to 1253 *Fuslee* : estimate for stamp Company's rupees 9,890-14-9.

The mortgage deed is one of conditional sale, and was granted on the 16th September 1831, corresponding with the 24th *Bhadoon* 1238 F. by Baboo Ishur Dut, father of appellants, to Omrao Singh, father of the named respondents, pledging as above *mouzah* Luhjee, in consideration of a loan of *Sicca* rupees 10,528. If the debt remained unsatisfied at the end of *Bhadoon* 1243 F. (1836), the engagement to be considered closed and the sale absolute.

The claim of redemption by appellants is founded on the fact of the debt having been satisfied by the usufruct, with a surplus to the amount stated due to them as proprietors : it is met by a counter assertion that the usufruct just covered the interest and no more ;

and that the principal remaining unliquidated, the contract was still in full force.

The accounts submitted by appellants themselves exhibit, to a fraction, the clear return from the lands of a sum just sufficient to cover the interest of the loan as pleaded by respondents; and the principal sudder ameen has decided accordingly in their favor by dismissing the suit.

There was a plea on the part of appellants, of a portion of the loan on which the mortgage was granted not having been received by them. This was stated at 494 rupees, but there was their own acknowledgment of the receipt of the whole; and this plea, after a lapse of so many years, was regarded as altogether inadmissible.

Concurring in the view of the case taken by the principal sudder ameen, I affirm the judgment appealed against, with all costs chargeable to appellants.

THE 11TH JULY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION NO. 202 OF 1848.

IN the matter of the petition of Mr. John Calder, filed in this Court on the 21st June 1848, praying for the admission of a special appeal from the decision of the judge of Hooghly, under date the 24th March 1848; affirming that of the sudder ameen of the same zillah, under date the 27th July 1846, in the case of Meer Dad Ali, plaintiff, *versus* Mr. John Calder, defendant.

The decision of the sudder ameen was *ex parte*; and the defendant appealed summarily that notice had not been served on him, when, on 29th September 1847, the judge recorded his opinion that the *nuthee* did not furnish legal proof of notice having been served, and therefore he allowed the petitioner to appeal; and in appeal affirmed the decision of the sudder ameen.

But, when the judge admitted the insufficiency of the evidence to prove that notice had been served on the defendant, he should have remanded the case to the sudder ameen for re-trial in presence of the defendant.

I therefore annul the decision of the judge dated 24th March 1848, as well as that of the sudder ameen dated 27th July 1846; and remand the proceedings to the latter officer, who will proceed *de novo* with the suit, issuing notice to the defendant in due form when the proceedings shall have been received in his court.

THE 11TH JULY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 63 OF 1847.

Regular Appeal from a decision passed by the Principal Assistant of Gawalparah, November 4th, 1846.

HURDYAL SINGH, APPELLANT, (PLAINTIFF,)

versus

RAJAH OMRIT NARAIN, SON OF RAJAH INDERNURAIN,
DECEASED, RESPONDENT, (DEFENDANT.)

SUIT laid at rupees 11,669-6-5. The following judgment of the principal assistant, Lieutenant E. T. Dalton, fully sets forth the particulars of this case, together with the grounds of his decision.

‘Plaintiff sued to recover from the Rajah of Bijnee the sum of Company’s rupees 8,232-8-5, with interest, on certain bonds, accounts, and other documents, which had been sold by order of the principal assistant commissioner to liquidate demands against an individual named Radha Mohun.

‘Radha Mohun was confined in the civil jail for debt; and, to extricate himself from his difficulties, offered these papers, which contained accounts of pecuniary transactions between his uncle Phoolchund and the Rajah of Bijnee, for sale; but not obtaining a purchaser, they were sent into court, and sold by public auction on behalf of Radha Mohun, and purchased by the plaintiff for the sum of Company’s rupees 1,325.

A *punchayet* was appointed to examine these accounts, when the case was first under investigation; but before they came to any conclusion, the *kutcherry* was burnt down, and all the accounts, papers, &c., relating to the matter destroyed.

‘The plaintiff renewed his suit on the 14th April 1838, filing documents which were alleged to be copies of all those originally produced. The defendant, generally, denied the liability, acknowledging that there had been pecuniary transactions between his father (the original defendant) who had died and deceased Phool Chand, but denied that any thing was due. Phool Chand had the *ijarah* of several farms under the Rajah, from the rent of which the bills drawn by the latter were paid.

‘Two members of the *punchayet* were examined, with reference to their examination of the accounts of the parties when the case was first under investigation. They stated, that the documents filed by the plaintiff shewed a balance against the Rajah of upwards of 7,000 rupees: they could not recollect the exact amount, or

the nature of the documents. A *khata-bye*, or account book, between the parties was sent for, but hardly examined, as the *kutcherry* was burnt before they completed their investigation. The accounts given in by the Rajah were but cursorily looked into.

Other witnesses, on the same side, assert that an extra-judicial examination of the accounts, &c. of both parties, shewed a balance in favor of the Rajah of upwards of 4,000 rupees.

It is however in evidence, that an offer was made by the defendant to compromise the case, and his bonds for 1,500 rupees and 2,000 (in favor respectively of the plaintiff and a creditor of the plaintiff's) for plaintiff's;* but this was not accepted in consequence, it is asserted, of the Rajah's *mookhtar* having demanded 200 rupees as a *douceur* for himself; or, according to one witness, in consequence of 500 rupees having been demand by the *mookhtar* and *dewan* of the defendant for a similar purpose.

The account filed by the plaintiff in this suit, as made out from the original documents, is considered by some of the witnesses to be the same as that which he filed with the purchased documents on the first occasion. The principal assistant commissioner, Captain Davidson, on the above evidence, decreed for the plaintiff, viz. rupees 7,500 as the amount due on the bonds, &c., and interest, which brought up the sum to Company's rupees 13,863, 4 *annas*, 3 *pie*.

Against this decision the defendant appealed; and, on the 11th October 1841, the order was upheld, and the appeal dismissed by the deputy commissioner of Assam. But on review of judgment, on the 12th March 1842, a sum of Company's rupees 2,632 was decreed as the principal due by the plaintiff's accounts; and, as the interest would otherwise exceed the principal, an equal amount as interest, making it rupees 5,264, with additional interest on that sum from the date of the principal assistant's order.

Against this decision a special appeal was, at the instigation of the plaintiff, admitted by the Sudder Court, on the grounds that the interest of the debt had not been consolidated with principal, but left unadjusted, whilst the actual amount of debt was reduced by the collections. But on the proceedings being submitted before that Court, the case was remanded to be tried *de novo*, with particular attention to the necessity of ascertaining more particularly the nature of the documents originally purchased by the plaintiff.

On the case again coming before this Court, the plaintiff (27th January 1845) filed a supplementary petition, by which he sues to recover the sum of 11,669 rupees, 6 *annas*, 5 *pie*, with interest, instead of rupees 8,232, 8 *annas*, 5 *pie*, as originally demanded. The difference being obtained by consolidating the interest with the

* Sic in original.

principal, and bringing forward the aggregate amount of both as the balance due by the defendant.

‘Every attention has been paid to the Court’s orders of the 18th March 1844, but nothing further relating to the nature of the original documents has been elicited. By the report of the *nazir* of this court, it appears that some documents were sold to the plaintiff for upwards of 1,300 rupees; but he has no recollection of their tenor, and cannot say whether they were on stamp paper, or not.

‘The defendant having been called on to substantiate his pleas, gives evidence to shew that the deceased, Phoolchund, held various large *mehals* of the rajahs, and further files his receipts for revenue from *ryuts* thereof.

‘That the plaintiff did purchase at a public sale, accounts and other documents appertaining to the estate of the deceased Phoolchund, and that these accounts and documents related to pecuniary transactions between Phoolchund and the Rajah of Bijnee, is undisputed. But the whole of them having been destroyed, and there being no proof, or means of now knowing that the original documents contained a fair exposition of all pecuniary transactions between the Rajah and Phoolchund, or of ascertaining if the papers now filed are *bond fide* copies of those that were produced at the sale, or that the *originals were legal* vouchers on which an action could be sustained, I am of opinion that the plaintiff is not entitled to a decree upon them.

‘The decree originally given in his favor, seems to have been grounded on the evidence of the parties to whom, when the case first came before a court previous to the destruction of the papers, they were referred for examination and report. But these witnesses state that their labors were incomplete, when the fire put a stop to them; that they had not fully examined the account book, or the accounts filed on the other side; and that the result given by them was entirely derived from the plaintiff’s papers.

‘Now, the nature of the transactions between the original defendant and deceased, Phoolchund, were such as rendered an examination of accounts on both sides indispensable towards arriving at a fair conclusion as to what was actually due to either. Phoolchund had an *ijarah* of several *mehals* belonging to the Rajah, and the Rajah was in the habit of giving orders upon him for sums of money in anticipation, or in lieu of the revenue accruing from such *mehals*. In several of the documents filed as copies of the acknowledgments purchased by the plaintiff it is expressly so stated viz. orders for payment of sums to individuals, with directions that they should be carried to account of rent. Indeed, it might be supposed from them, that there were available assets when such orders were given.

‘ It is stated that the original defendant, when the case was first instituted, acknowledged the authenticity of the document purporting to be an accepted account closed 1224 B. Æ., and of two of the *tumasooks*, or bonds; and as this has not been disputed, it may be considered as established. But several witnesses adduced by the *plaintiff*, declared that all subsequent transactions included (and plaintiff includes them all) there was a balance in favor of the defendant of upwards of rupees 4,000. This result was obtained from an examination of the papers in plaintiff’s possession previous to their destruction by fire, and comparing them with the defendant’s, and charging interest upon unadjusted arrears of rent. Although, from other circumstances, I do not place much reliance on this account, I think it is entitled to as much credit as a calculation of what was due, grounded solely on the papers of the deceased Phoolchund, supposing they had all been fairly examined, Although the plaintiff has not, in my opinion, been able to make out that he is entitled to a decree on any of the points above alluded to, I think there is evidence to shew that, had it not been for the destruction of the papers, a settlement of accounts would have exhibited a balance against the Rajah in favor of Phoolchund, therefore of the plaintiff.

‘ The plaintiff lays considerable stress on the circumstance of a compromise having been offered by the defendant. He is right; it is the only strong point in his case. I consider it as proved beyond a doubt, that the defendant, through his constituted agent, did make an offer by bonds to the amount of rupees 3,500 to compromise the case.

‘ The plaintiff in his petition asserts that this was rejected as too little; but by the evidence given in support of it, it is shewn that the only objection made by him was to the demands of the Rajah’s agents for *douceurs*.

‘ It appears from this the defendant considered the claim against him worth such an offer; and that the plaintiff was inclined to consider it sufficient. As there is nothing else in the case upon which a decision can be grounded, I decree the amount of this offer, (Company’s rupees 3,500) in the plaintiff’s favor, in lieu of all demands for principal or interest.

‘ Costs of original suit on this sum to be defrayed by the defendant. Costs of appeals, and all other costs, by the plaintiff.’

From the above decision the plaintiff has appealed, urging his right to the full amount of his claim.

After a careful perusal of the evidence in this case, I can see nothing upon which a decision can be satisfactorily based, with the exception of the ground taken by the principal assistant, viz. the evidence to the projected compromise, which is fully proved.

I accordingly affirm the decree of the lower court. The appellant will pay the costs of the appeal.

THE 13TH JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 79 OF 1847.

*Regular Appeal from a decision passed by the Principal Sudder
Ameen of Midnapore, November 17th, 1846.*

SREEMUNT LAL KHAN, APPELLANT, (PLAINTIFF,)

versus

MESSRS. J. AND R. WATSON, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellant—Ameer Ali and J. G. Waller.

Wukeel of Respondents—Pursun Komar Tagore.

SUIT laid at 47,292 rupees, 9 annas, 12 gundahs, for possession of hoodah Satpatee, &c., zillah Midnapore, together with mesne profits and interest thereon.

The property, for the possession of which this suit was instituted, is comprised within the zemindaree of Midnapore. The petition of plaint sets forth, that the plaintiff's father had taken various farming leases of it in succession from a period antecedent to the decennial settlement, had regularly paid his rents, and enjoyed undisturbed possession. That in 1225 *Umlee*, the then zemindar, Rajah Mohun Lal Khan, renewed the lease to the plaintiff's father in the name of one Kalipershad Raee, in perpetuity at a fixed rent of 3,739 rupees, 10 annas, 17 gundahs per annum; the property so leased being comprised in two lots,—first that of hoodah Satpatee and its appendages, at a jumma of 2,550 rupees; and, secondly that of hoodahs Soogunda and others, at a jumma of 1,189 rupees, 10 annas, 17 gundahs. That the plaintiff's father, and on his death his son, the plaintiff, held possession, and regularly paid the rents due on the lease. That Rajah Mohun Lal Khan died in 1237, and was succeeded by his six sons, who failing to pay the Government revenue, the zemindaree was sold for arrears of revenue on the 1st of September 1837, and purchased by the Government, who gave a farm of it to the defendants (Watsons). That Government afterwards, in 1839, ordered the restoration of the estate to the sons of Rajah Mohun Lal Khan. That an adjustment was entered into between the Rajah's family and the Government lessees, to the effect that the jungle *mehals* in the zemindaree, as per survey then in course of prosecution, were to be given under a new lease to the Watsons for 20

years from the date of the adjustment; that the adjustment was approved by the Government, and matters finally arranged as per collector's proceeding of the 22d July 1840. That, agreeably to this, the entire estate was restored to the zemindars, and that the Watsons remained lessees only of the jungle *mehals*. That they (the Watsons,) ejected the plaintiff from *hoodah* [Satpatee and its appendages, and from *mouzah* Purwa, a village comprised in one of the other *hoodahs*, held by the plaintiff, as being situated within the limits of the jungle *mehal* leased by them; for the recovery of possession of which the plaintiff now sues, together with mesne profits and interest from the date of dispossession as follows :—

Value of property,.....	25,294	0	10	.
Mesne profits,	17,455	8	2	
Interest,.....	4,543	1	2	
	<hr/>			
Total, ..	47,292	9	14	
	<hr/>			

The defendants (Messrs. Watsons) filed an answer, denying the plaintiff's allegation respecting his *istemrâris*, or perpetual lease; and pleading that he should be nonsuited for not having made the Government a party to the suit. With regard to the merits of the case, they stated that the Government having purchased the estate at public sale in 1837, gave them a lease of it in 1838; transferring to them, as lessees, its rights and privileges as auction purchaser, and authorizing them to annul all contracts, and set aside all incumbrances imposed upon the estate from the time of the decennial settlement, with the exception of such as are specially protected by Section 30, Regulation 11, 1822. That the Government subsequently restored the estate to the zemindars; that the sale, however, was not reversed, but on the contrary maintained. That the Government could not enter into any arrangement adverse to their rights; and that consequently possessing, as lessees of the auction purchaser, full power to void all contracts of the nature of that pleaded by the plaintiff, the suit should be dismissed.

The zemindars filed an answer in support of the plaintiff's claim.

The principal sudder ameen dismissed the plaint for the reasons set forth in his decree; and from his judgment the present appeal has been preferred.

We are of opinion that the plaintiff's *pottah* has been established by the evidence on the record; and that, with reference to the nature and circumstances of the case, there is no sufficient ground for an order of nonsuit, in consequence of the Government not having been a party to the suit; the plaintiff having sued Watson and Co. as lessees of the zemindar, not of the Government. We

accordingly proceed to the merits of the case, the decision of which turns entirely upon the question of the competency of the lessees (Messrs. Watson and Co.) to annul the under tenures comprised within the limits of their farm of the jungle *mehals*, which form a portion of the zemindaree sold for arrears of revenue, and purchased by the Government on the 1st September 1839.

The sale was affirmed by the revenue authorities and the Government of Bengal ; and, in June 1838, the estate was let in farm to Messrs. Watson and Co., at a rental of 1,20,000 rupees per annum. One of the conditions of the lease is to the following effect :—‘ The estate to be surveyed by a professional surveyor, the name and rental of every existing village within its boundaries ascertained, and a settlement for each concluded with the subordinate tenant or *talookdar* by whom it is managed ; all *ijarahs*, or farms, granted by the late proprietors, and all tenures created since the decennial settlement not coming within the exceptions specified in Section 30 of Regulation 11, 1822, have been annulled by the sale of the estate, and may be set aside by the settling officer.’

The following are further conditions of the same lease :—‘ All leases granted since the perpetual settlement by the zemindar will be inquired into under the provisions of Regulation 44 of 1793—Section 9, Regulation 1 of 1801—Sections 4 to 11, of Regulation 5, 1812—and Sections 29 to 33, Regulation 11, 1822, so soon as the Government lessee shall institute suits in the collectorate with that object.

‘ Should the sale of the Midnapore zemindaree be at any time reversed by a court of justice, the lease is from that date to be cancelled, and the farmer to resign all right to possession and profit thenceforward, as also any claim whatever against Government on account of the time he may have held possession.’

The farm was thus given to Watson and Co. at a time when Government was *de facto*, and believed itself to be *de jure* proprietor of the estate by auction purchase.

While these measures, however, were being adopted by the revenue authorities and sanctioned by the Government of Bengal, the question of the legality of the sale had come before the Supreme Government. It was determined that it was illegal. An exposition of the views of Government upon the subject is given in the following extract from a letter from the secretary to the Government of India to the secretary to the Government of Bengal, under date the 15th June 1839 :—

‘ His Honor in Council concludes that the estate must be restored to the owners in every respect free as it was before the sale, the under tenures of course remaining as they were, and Mr. Watson’s lease being set aside. This, the President in Council conceives, can only be done by annulling the sale : for it would

not be sufficient to restore the estate to the old proprietors, as all under tenures fell with the sale, and there might be some difficulty where there are so many proprietors, of whom many are minors, in completely saving these tenures otherwise than by the annulment of the sale. The President in Council but for the lease to Mr. Watson, would have had no hesitation in immediately annulling the sale under Clause 4, Section 3, Regulation 11 of 1822. With reference, however, to the peculiar circumstances of the case, it would be preferable, in the first instance, to come to an arrangement with Mr. Watson, on equitable terms, for the relinquishment of his lease, including compensation for any outlay or loss which may have been actually incurred by him; after such an arrangement the sale can be cancelled by Government without difficulty. But, if that gentleman should prove unreasonable, it will then be necessary to suggest to the late proprietors to institute a suit in court to set aside the sale, and to direct the Government pleader to consent to judgment against Government as purchaser; but it is desirable to avoid this expensive process, if complete justice to all parties can be done otherwise.

‘In whatever manner the restitution may be accomplished, the President in Council conceives that it should be full, and done in a liberal manner, accounting with the proprietors for all mesne profits after deducting the revenue. The remission of revenue made after the sale will of course be nullified by the restitution; but, if there should still be a balance against the estate, it will be but fair to allow time for making it good, in consideration of the unjust dispossession to which the owners have been subjected.’

The illegality of the sale being admitted, nothing could have been more just and equitable to all parties than the views entertained by the Supreme Government. The estate was to be restored without loss to the proprietors, and the Government was to relinquish all right and title to it. In regard to all under-tenures, the sale was to be treated as a nullity: this was a point of primary importance, as it unquestionably was one of primary duty with the Government. The lease to Watson and Co. was to be set aside, and they were to receive compensation for actual loss suffered by them. In fact every thing was to be put into the same condition as it was before the sale, and no party was to suffer actual loss with the exception of the Government itself to the extent of the compensation to be paid to the lessees.

Difficulties, however, occurred in carrying out these views of the Government. They are set forth in the following extract (paragraphs 8 to 11,) from a letter of the Supreme Government under date the 18th November 1839:—

‘8. The President in Council sees with regret that this matter is not likely to be amicably arranged by the zemindars and Mr.

Watson, even by the offer of compensation for actual loss to the latter party. If such an arrangement should even now be agreed to, he should feel much gratified, as he is sure that it would be for the true interests of all parties.

‘ 9. He observes, with regard to the obstacles to an amicable settlement mentioned in paragraph 56 of the Board’s letter, that this might easily be removed by an act of Government. The lease of the tract called jungle *mehals*, if legally granted to any tenant, might, even in the event of a sale of the whole estate for arrears, be reserved by Government at the time of sale, under Section 31, Regulation 11 of 1822; and, under the circumstances, a pledge to this effect might properly be given now, or, in the event of a sale for arrears, a pledge to sell that tract separately, with a separate *jumma* fixed as in case of *butwarreh* might be given.

‘ 10. He perceives that the affair is unfortunately complicated by a third party, a Mr. MacDonald, a rival indigo planter on the estate, who claims to hold a great part of the tract desired by Mr. Watson, under a lease granted by a person who alleges that it is his under-tenure, and whose claim would appear to be supported by the zemindars. This question seems to have no necessary connexion with that between Mr. Watson and the zemindars. It may be distinct from the question of the validity of the sale: for if the claim is tenable, the tenant under the sale, even if valid, might want power to oust the claimant; and if the claim is not tenable, it is to be regretted that it should stand in the way of a settlement. The President in Council therefore is sorry to find that the plan of referring this difference between the two indigo planters to arbitration has been given up by those gentlemen, as it would be difficult to see how a reference to arbitration could injure the fair right of either party, whilst it would save much expense and time to both; and as the President in Council gathers from the Board’s letter, that this is the only obstacle to an amicable arrangement between the zemindars and Mr. Watson, he would much wish one more attempt to be made to effect it, supposing this difference with a third party still to stand in the way of an arrangement between the other two.

‘ 11. But if an amicable settlement is impracticable, then, on payment of the arrears of *jumma*, all right and interest which Government may have in the property must be restored to the zemindars, upon condition of their abandoning all claims against under-tenures in consequence of the sale. Further, the zemindars must be informed that the Sudder Board, with the sanction of the Government of Bengal, having given possession to Mr. Watson, as a tenant on a lease for 20 years, it is for them to chose whether to institute a suit for the annulment of the same on the ground of the sale being invalid, or to accept the property subject to Mr. Watson’s lease. If they prefer the former course, His Honor

in Council is of opinion that on the transmission of the petition of complaint to the revenue authorities, under the provisions of Regulation 2, 1814, the civil court should be informed that the Government, considering the sale illegal, had already afforded all the redress in their power to the complainants by the restoration to them of the rights and interests acquired thereby; and that in regard to Mr. Watson's lease, the suit would not be defended on the part of Government, in consequence of that gentleman having taken upon himself by a clause in the agreement the whole risk of the transaction.'

The difficulties evidently arose out of the unwillingness of Watson and Co. to abandon the lease, and the claim advanced by Mr. MacDonald, a lessee under the plaintiff in this suit of the very lands now forming the subject of litigation between the lessor of Mr. MacDonald and Watson and Co. In regard to this claim, the Government say, 'it may be distinct from the question of the validity of the sale: for if the claim is tenable, the tenant under the sale, even if valid, might want power to oust the claimant; and if the claim is not tenable, it is to be regretted that it should stand in the way of a settlement'. It is unfortunate that any thing towards the adjustment of the opposing interests was left to depend upon conditions to be subsequently ascertained. Had inquiry been made at the time, it would have appeared that the tenure of Mr. MacDonald lessor's, the plaintiff in this suit, was just one of those which could be voided only under a title by auction purchase at a sale made for arrears of revenue. But, however that may be, the letter of the Supreme Government affords the best proof that the claim on this under tenure was advanced before any adjustment took place.

Up to the 18th November 1839, the Supreme Government clearly entertained the same views as it originally adopted in regard to the under tenures. The relinquishment of the estate to the zemindars was to be accompanied by the essential condition that these tenures were to be protected, and that not partially, but completely throughout the estate. There is an oversight, however, in what follows, when it is said that 'the zemindars must be informed that the Sudder Board, with the sanction of the Government of Bengal, having given possession to Mr. Watson as a tenant on a lease of 20 years, it is for them to chose whether to institute a suit for the annulment of the same on the ground of the sale being invalid, or to accept the property subject to Mr. Watson's lease.' This was apparently giving the zemindars the choice of two alternatives, but it was in fact leaving them no resource but that of going into court to annul the lease. To accept the property subject to Mr. Watson's lease was impossible, consistently with the maintenance of the under tenures, as one

conditions of the lease was that the lessees might exercise in regard to them all the rights of an auction purchaser, the most important of which is that of annulling all such tenures created after the decennial settlement. It appears to us, that if the zemindars were to be forced into court, no form of action, under the circumstances, was so expedient as that of a suit to reverse the sale, which would have fully met the views of the Government, and would at once have put an end to all difficulties.

Negotiations were carried on, and at length terminated in a settlement. Some of the provisions of which, as shewn by the letter of Mr. Commissioner Mills to the collector of Midnapore, dated 22d June 1840, are as follow:—

‘The Government resign to the zemindars all their right, title, and interest acquired by purchase of the Midnapore estate; the zemindars paying up the balance of revenue due on the 1st May, viz. 49,913 rupees, 6 annas, 2½ pie, and engaging to pay to Government the *sudder jumma* of the estate as borne on the *toujee* from the 1st May 1840.

‘Mr. Watson will resign to the zemindars all his right, title, and interest as lessee in the whole estate, with the exception of the tract called the jungle *mehal*.

‘The rent of the tract retained by Mr. Watson will be fixed, and the necessary agreements executed on the terms, and in the manner specified in the petitions of the parties, and explained in paragraph 4 of my letter of the 23d ultimo.

‘The zemindars, on receiving possession of the estate, will execute an engagement binding themselves not to exercise any of the privileges of an auction purchaser under Section 30, Regulation 11, 1822; but the conditions of this engagement will not affect the rights reserved by Mr. Watson in the jungle tract retained by him in right of his lease from Government.

‘The *jumma* of the jungle tract, when adjusted, will be notified to you; and the Government promise to reserve the lease of that tract under the provisions of Section 31, Regulation 11, 1822, in the event of the estate being again brought to sale for recovery of the arrears of Government revenue, provided always that the lessee has fulfilled his engagements with the zemindars, and paid up the stipulated rent.’

Then, after some instructions in regard to the adjustment of accounts between the parties, the letter of the commissioner proceeds to say:—

‘Acquittances in full of all demands will be taken from the zemindars and from Mr. Watson; and Mr. Watson will add a declaration that, should litigation arise from any quarter in connexion with the case, he will make no claim against the Government on account of any consequences that may ensue; and the zemindars

will consider themselves bound by the restoration of their estate on these terms to institute no legal proceedings in the courts to reverse, or bring into question, any part of this arrangement.'

The adjustment, of which the foregoing are some of the principal provisions, was carried into effect,—the parties to it being the Government as auction purchaser, the zemindars, and the lessee, Mr. Watson.

It is here necessary to advert briefly to the position of the engaging parties.

The Government had purchased the Midnapore estate at a public sale made for arrears of revenue for the sum of 1 rupee, as stated by the pleader of Mr. Watson. Objections to the sale had been urged by the ex-proprietors to the revenue authorities, and to the Government of Bengal, but without success. The case was then carried to the Supreme Government, where it was discovered that the sale was illegal. Had the Supreme Government also overlooked the illegality, there was very little probability of the ex-proprietors failing to bring their case before the courts of justice. The *sudder jumma* of the estate purchased by Government for 1 rupee was 90,000 rupees. It had been let in farm to Mr. Watson for 1,20,000 rupees per annum; it was not likely therefore that the zemindars would have abandoned the prosecution of their claim for a reversal of the sale of such valuable property, until every remedy which the law allows had been tried and exhausted. The Government however saw the illegality, and resolved upon restoring the estate to the zemindars. It was desirous of doing this without resorting to the courts of justice; and would have annulled the sale at once but for the difficulties in the way arising out of the lease to Mr. Watson. The position of the Government then was that of a purchaser at an illegal sale, willing to relinquish the purchase, and desirous of avoiding the 'expensive process' of a law suit, but trammelled by the engagement into which it had entered between the date of the sale and that of the discovery of its illegality.

The position of the zemindars was that of parties anxious to procure the restoration of their estate, and willing to sacrifice something in order to effect that object, without the expense and delay of a law suit.

The position of the lessee was that of one anxious to retain his lease; but who, whatever claims he might have advanced, must have been prepared to make any concession that might have been demanded of him. He held his lease from a party who admitted an illegal and faulty title, and was ready to confess judgment should a suit be instituted for the reversal of the sale. One condition of the lease was, that 'should the sale of the Midnapore zemindaree be at any time reversed by a court of justice, the lease is from that date to be cancelled, and the farmer to resign all right to possession and profit thenceforward,' as also any claim what-

ever against Government on account of the time he may have held possession.' He cannot be blamed for endeavouring to make the best terms for himself; but above all, it was to his interest that the matter should be kept out of court.

The terms of the adjustment next demand attention. The Government relinquishes all right and title to the estate, which is restored to the zemindars. The under tenures are to be protected throughout the estate, with the exception of that part of it which is to remain in the possession of Mr. Watson as lessee. Mr. Watson is to enter into agreements with the zemindars for the jungle *mehals*, resigning all his right, title, and interest in the rest of the estate. These terms might have been the most advantageous for the parties themselves; but in part of the adjustment, the rights of absent parties were involved. The Government insisted upon the protection of the under tenures in the largest portion of the estate; but, in concession to the lessee, sacrificed those in the jungle *mehal*, the lease of which was continued to Mr. Watson at an annual rental of 16,802 rupees, for which he entered into engagement with the zemindars. The present action brings into issue the question, whether, under the circumstances in which the engaging parties were placed, it was competent to all, or any of them, to exercise the privileges of an auction purchaser in regard to under tenures liable to be voided by a sale for arrears of revenue.

We have no special rule, and no precedent to guide us; and we must therefore decide upon the equity of the case. The expropriators declare the sale to be illegal: the purchaser admits that it is so; and these parties, together with the lessee of the latter, all of them desirous of avoiding a suit in court, meet to adjust the matter. Could they, under such circumstances, legally come to any adjustment affecting the rights of absent and innocent parties? By a sale of an estate for arrears of revenue, all under tenures created after the decennial settlement are *ipso facto* void; but those tenures are revived on the reversal of the sale by a decree of court. A decree of court reversing the sale, would, in the present case, have protected all the under tenures, and the terms of Mr. Watson's lease, as far as *they* were concerned, would have been altogether a nullity. Instead of resorting to a court of justice, and in order to avoid this 'expensive process', the parties proceed to an adjustment of the matter. The zemindars, as already observed, declare the sale to be illegal: the purchaser directly admits that it is so, and the lessee, by implication, admits the same, for he is a party to the transaction which involves the relinquishment of the estate by the purchaser to the proprietors, and at the same time surrenders the lease obtained by himself from the purchaser. To admit an auction purchaser, on the ground of illegality in the sale, to restore the estate to the pro-

prietor without the intervention of a court of justice, and to transfer to him all the rights and privileges of an auction purchaser, is to add another to the shifts and expedients already in practice among landholders for the extinction of titles created by themselves upon the receipt of large considerations for the creation of them, and to jeopardize by an evasion of the law the rights of the holders of such titles. We do not mean to say that the possessor of a title is not to exercise his rights and privileges under that title, because there was originally a defect in it; nor do we mean to say that an existent defect in the conditions of a sale is to deprive the auction purchaser of his rights and privileges as such, so long as the sale is not contested. We are of opinion, however, that when the sale is admitted by the purchaser himself to have been illegal, and he relinquishes the estate to the ex-proprietor by an adjustment which is had recourse to in order to avoid the expense of a law suit, such adjustment is a substitute for a decree of court, and must carry with it equal force for the protection of the under tenures. Such an adjustment is not a re-conveyance of the estate by a fresh sale, but an abandonment of the auction purchaser's title, and consequently an abandonment of his rights and privileges under it.

For the foregoing reasons, we consider that the plaintiff is entitled to hold possession of his under tenure against the defendants, on payment of the stipulated rent; and that the principal sudder ameen's decree must be reversed.

The plaintiff has sued for mesne profits at the rate of the annual gross rental of the estate; but no evidence has been given to shew what that is. It is upon the record, however, that the plaintiff let *hoodah* Satpatee and its appendages to Mr. MacDonald for 5,105 rupees per annum in money and kind, viz. 4,675 rupees in money, and grain to the value of about 430 rupees per annum; from which deducting the sum of 2,550 rupees as annual rent, there remains a profit of rupees 2,550 per annum. The plaintiff claims 436 rupees per annum on account of *mouzah* Purwa; but there is no evidence of the actual assets of the village. The plaintiff's pleader expresses for his client his consent to receive 2,700 rupees as the amount of annual profits for the whole of the lands, rather than prolong the case by further enquiry, which, as being within the sum to which he is entitled, we award. The plaintiff will receive from Messrs. Watson and Co. the sum of 2,700 Company's rupees per annum for the years 1248, 1249, 1250, and 1251 *Umlee*, with interest thereon from the date of suit; and the same sum for every succeeding year to the date of obtaining possession, with interest on each year's profits from the commencement of the following year.

The plaintiff's costs will be charged to the defendants, Messrs. Watsons. The several defendants will pay their own costs.

THE 13TH JULY 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 182 OF 1847.

*Regular Appeal from a decision passed by the Principal Sudder Ameen
of Mymensingh, January 20th, 1847.*

BHYRUB INDER NURAIN RAE, APPELLANT, (PLAINTIFF,)

versus

RANEE BHOOBUN MAYE DIBBEA, RESPONDENT,
(DEFENDANT.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—Ramapershad Raee.

THE case was referred to a full bench by Mr. Hawkins with the following note.

“ Suit laid at rupees 8,723-3-2, principal and interest of arrears of rent.

“ The following decree of the principal sudder ameen sets forth the general features of the case :—

“ The plaintiff states that his 4 annas’ share of *pergunnah* Pookereea was held in *ijara* by Ranee Bhoobun Maye, the defendant ; that rents on which from *Assin* to *Chey*t 1238 B. S., being a period of seven months, amounting to rupees 4,089, were due by her. That plaintiff was a minor, and did not attain his majority till 1249 B. S. ; and, as owing to the dishonesty of his *wusse* and guardian, who were sometimes appointed and at others dismissed, attention was not paid for the recovery of the above amount, and hence the cause of the delay in prosecuting the present suit. That plaintiff being now of age, sues for the recovery of the amount principal, with interest thereon, amounting in all to Company’s rupees 8,723, 3 annas, 2 pie.

‘The defendant pleads that the institution of this suit is barred by the rule of limitation, the complaint having been instituted after the lapse of 12 years from the date or period for which the rents are claimed ; besides, defendant has liquidated the amount of rents to the *wussee* appointed on the part of the plaintiff. That the plea of minority set up by the plaintiff, when guardians and managers on his part were duly appointed, cannot hold good ; to which effect a precedent of the Sudder Court, recorded in English, and dated the 27th March 1844, is submitted ; that therefore the plaintiff’s claim under Section 14, Regulation 3, 1793, is inadmissible.

‘The injunctions laid down in the Sudder Court’s Circular Order dated the 13th September 1843 having been gone through, and the parties having filed the undermentioned documents, viz. plaintiff, a copy of a letter from the Sudder Board of Revenue to the commissioner of Bauleah, dated the 11th October 1836, and a copy of a proceeding of this court dated 10th September 1845 ; and the defendant, the English decision before referred to, dated the 27th March 1844, and a Persian or Hindee decision of the same Court dated 24th May 1842. I proceed to try the question as to whether this suit is, or is not barred by the rule of limitation.

‘Having this day taken up the trial of this point, I am of opinion that the plaintiff’s claim is inadmissible under the law of limitation, on the following grounds :—*first*, it appears, reckoning from the period up to which the plaintiff claims rents (viz. the *end of Cheyt* 1238 B. S. to that of date of institution of this suit, the 13th *Sawun* 1253 B. S.) that 14 years, 3 months, and 13 days have expired.

‘*Second*.—The plea of plaintiff’s minority, and that his *wullee and wussee* were some times appointed and some times removed, and, hence the cause of the delay in bringing on this suit, is good for nothing ; because from the copy of the Sudder Dewanny decree dated the 24th May 1842, filed by the defendant in this case, it is clearly observable that on account of rents due on this same *ijara*, and for a period *subsequent* to that for which the *plaintiff now claims*, his *wullee* and *wussee* instituted a suit, and obtained a decree in the zillah court on the 16th January 1840. Under such circumstances, how can the plea of the plaintiff that some times his managers and guardians were conducting his affairs, and at others *not*, and that they disregarded his interests in not bringing on this suit, be considered tenable ? That it is *not* tenable, is shewn from the copy of the Sudder Court’s English decision dated the 27th March 1844, whereby a similar plea set up by a minor, and whilst his affairs were being conducted by a manager acting for him, was over-ruled.

Third.—The copy of the Sudder Board's letter filed by the plaintiff, in proof of the dishonesty of his manager and guardian, avails him nothing, because from the reply to the questions put by me to the plaintiff's *wukeel*, it appears that the *wullee* and *wussee* alluded to in that letter were *Kaleepersaud* Sein and *Tarra Munnee Dibeea*, and not *Ramsoonder* Chowdhree; who was subsequently appointed to that charge, and who conducted suits on the part of the now plaintiff. Nor has the plaintiff produced any proof to impugn the honesty of this individual's character.

Fourth.—The copy of the proceedings of this court dated 10th September 1845, filed by the plaintiff in this case, cannot be considered as a precedent in supersession of a final decree of the Sudder Court, and therefore is of no avail to the plaintiff. On these reasons therefore, considering the claim of the plaintiff barred by the rule of limitation, I would dismiss it.

'Order accordingly, that the claim of the plaintiff be dismissed with costs.'

"From the above decree the present appeal has been preferred.

"I refer the case to a full bench under Act 2 1843, as the Court have recently resolved to adopt as a precedent, a judgment pronounced by Mr. Jackson on the 2d March last, in the case of *Ram Surn Maye versus Gudadhur Chowdhree* and others, in which it was held that the period of disqualification to sue during minority, is not to be calculated against a party in circumstances similar to those in which the plaintiff in the present case stands. The plaintiff in that case, as well as in the present, was a ward of court under the tutelage of guardians, and the property of both under the care of managers appointed by the public authorities."

MESSRS. TUCKER AND HAWKINS.—We are of opinion that the suit is not barred by the rule of limitation, the cause of action having occurred during the minority of the plaintiff, and the suit having been instituted within 12 years of his attaining his majority. We accordingly reverse the decree of the principal sudder ameen, and remand the case for investigation upon its merits.

SIR R. BARLOW.—I was in the minority on the occasion of Mr. Jackson's decision being adopted as a precedent, but I consider myself bound by the resolution of the majority of the Court, and therefore concur with my colleagues in remanding this case.

THE 13TH JULY 1848.

PRESENT:

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 183 OF 1847.

*Regular Appeal from a decision passed by the Principal Sudder
Ameen of Mymensingh, January 25th, 1847.*

BHYRUBINDER NURAIN RAE, APPELLANT, (PLAINTIFF,)
versus

RANEE BHOOBUN MAYE DIBBEA, RESPONDENT,
(DEFENDANT.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—Ramapurshad Ruae.

THE case was referred to a full bench with the following note by Mr. Hawkins:—

“Suit laid at rupees 5,965-14-3, principal and interest of arrears of rent.

“The following is the decree of the principal sudder ameen in this case.

‘The plaintiff and defendant in this suit are the same as in the * case No. 52 of 1846, decided by me on the 20th instant, and the claim also is similar being for arrears of rents; the only difference is, that in this suit plaintiff sues for the recovery of the balance due to him in execution of a summary decision passed in his favor by the collector on the 25th January 1832, and which was struck off the file on the 4th January 1837.

‘The defendant urges in this the same plea as urged in the foregoing suit, *i. e.* lapse of time in bar thereof; and with reference to which, in like manner, the mode of procedure laid down in Circular Order dated the 13th September 1843 was first proceeded with.

‘For the reasons recorded by me in the suit No. 52 of 1846 and decided on the 20th instant, I am of opinion the institution of this suit is also barred by the rule of limitation; and, in addition to them, I would assign the following in the present case. That although it is shewn that the execution file of the collector’s summary decision was not struck off till the 4th of January 1837, it has also been shewn by the copy of the same *durkhast*, dated the 25th Magh 1238 B. S., that no amount has been recovered thereon after the 3d February 1832; so that from that date to that of bringing on the present action, (27th July 1846) 14 years and nearly 6 months have expired. Besides, I am not aware that

* Vide case preceding.

there is any law which renders it imperative that the 12 years limited for bringing on a suit, should reckon from the date on which the execution of a summary award was struck off a file, and not from that on which the same was passed. On the contrary, I am of opinion it should date from the day on which the award was given, or, if not, certainly from that on which the last amount realized under the execution of decree was obtained. But from neither of these dates does the present suit come within the 12 years allowed for institution of a regular suit; and I would therefore, considering the claim barred by the rule of limitation, dismiss it.

‘ Order accordingly that the claim be dismissed with costs, and that a copy of my decision recorded in English in the case No. 52 of 1846, and dated the 20th instant, be put up along with the papers of this file.’

“ From the above judgment the present appeal has been preferred.

“ I refer the case to a full bench under Act 2 1843, for the same reason as that given in case No. 182 of 1847, referred this day.”

MESSRS. TUCKER AND HAWKINS.—This is a *case of the same nature as that decided this day between the same parties. For the same reasons as therein given, the case is remanded for investigation on its merits.

SIR R. BARLOW.—See my note in case No. 182 between the same parties.

THE 15TH JULY 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 99 OF 1847.

Special Appeal from a decision passed by the first Principal Sudder Ameen of Zillah Tirhoot, March 24th, 1846; confirming a decree passed by the Moonsiff of Dulsing Serai, May 21st, 1845.

CHUCKEN SAHOO AND ANOTHER, APPELLANTS,
(DEFENDANTS,)

versus

ROOP CHAND PANDAY, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Gholam Ahmud.

Wukeel of Respondent—None.

THIS case was admitted to special appeal, on the 5th October 1847, under the following certificate recorded by Mr. C. Tucker :—

* Vide preceding case.

‘This was a suit for balance of rent due; and the plaintiff’s claim is as follows.

3 <i>biggahs</i> , 15 <i>cottahs</i> , and 3 <i>dhoors</i> of land at various rates,	14	11	6
Additions, viz.			
<i>Burdana</i> ,	2	8	0
<i>Batta</i> ,	2	14	6
<i>Dawk</i> *expenses	0	8	3
<i>Cutwallee</i> tobacco,	1	5	0
Difference between <i>Sicca</i> and Com- pany’s rupees,	3	3	6
Mangoe trees,	13	12	0
Bamboos,	12	0	0
Ditto another kind,	3	5	6
	39	8	9
	54	4	3

of which he acknowledged payment of rupees 9-12-6; and sued for the balance, rupees 44-7-9.

‘Defendant (the petitioner) in reply stated, that he held under *pottah* and without *pottah* in all 3 *biggahs* and 3 *dhoors* of land, at an annual *jumma* of rupees 11-8-9: of which 4 *annas* had been remitted, leaving a net *jumma* of rupees 11-4-9. That he had paid rupees 15-8, but got receipts for only rupees 11-12. That the bamboos and mangoes, charged to his account, are included in his *jumma*. That the items of *burdana*, *cutwallee* tobacco and *batta* are illegal cesses.

‘The moonsiff decreed for plaintiff as follows :—

Land rent,	14	11	6
<i>Burdana</i> ,	2	8	0
<i>Batta</i> on <i>Sicca</i> rupees,	1	1	6
Mangoe and Bamboos,	29	1	6
<i>Cutwallee</i> tobacco,	1	5	0
<i>Batta</i> on Company’s Rupees,	3	3	6
	51	15	0
Deduct amount received,	9	12	6

Due from defendant,

41 2 6;

and this decision was affirmed in appeal by the principal sudder ameen.

‘I admit a special appeal to try whether the items *burdana*, *cutwallee* tobacco, *batta* on *Sicca* rupees, and again on Company’s rupees, are not illegal cesses. There is no satisfactory explanation of the item *burdana* in the decrees of the lower courts, *cutwallee* tobacco is allowed because it has been allowed in former decrees. There is no explanation at all why *batta* is charged on both *Sicca*

and Company's rupees, and it is to be observed there is neither *pottah* nor *cubooleent* and the claim being for the year 1251 F.; when the *Sicca* rupee had long ceased to be current, the account demand should have been at once made out in the current coin, or Company's rupees.'

The respondent has not appeared in this Court. We consider the demand preferred by the respondent (plaintiff) to be an infringement of Sections 54 and 55, Regulation 8, 1793; and in conformity with the 61st Section of the same regulation, we decree the appeal, and nonsuit the respondent with costs.

THE 15TH JULY 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 193 OF 1844.

Special Appeal from a decree passed by the Judge of Chittagong, November 9th, 1843; reversing a decree passed by the Principal Sudder Ameen, July 19th, 1843.

THE SALT AGENT OF CHITTAGONG, APPELLANT,
(DEFENDANT,)

versus

RAMJEEWUN DUTT, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—Abas Ali.

THIS case was admitted to special appeal, on the 22d June 1844, under the following certificate recorded by Mr. J. F. M. Reid :—

'The plaintiff sued to prove his right to certain property, purchased by him on 5th October 1835 from Ubheh Churn Sein, attached by the salt agent in execution of a decree against the said Ubheh Churn Sein. The salt agent pleaded that Ubheh Churn Sein, on the 14th August 1835, executed an agreement by which he pledged all his property, real and personal, as security for the Government demands against him; and that, therefore, the alienation of the property to plaintiff was invalid. The lower courts were of opinion, that as the property in question was not specifically hypothecated (referring to Construction No. 1017) the plaintiff, against whom no fraud was proved, could not be deprived of his property, and accordingly passed a decree in his favor.

‘I admit a special appeal to try whether this judgment is correct or otherwise.’

Ubheh Churn Sein was appointed to the office of salt *darogah* by the salt agent at Chittagong; and on 14th August 1835 executed an engagement to the following purport, i. e. that he pledged the property detailed at the foot of the agreement, adding that neither himself nor his heirs would alienate by gift, sale, or otherwise, any of his property, real or personal, being in his own name or in the names of others, till his accounts should be settled. Shortly after the execution of this (that is about 2 months) Ubheh Churn sold to the plaintiff the property forming the subject of this action: this act of the seller the Court consider an undue alienation of the property which he had already pledged to Government; the exercise of such power he had voluntarily relinquished, and the plaintiff's purchase therefore becomes invalid. Under the above circumstances, we decree for the appellant, and declare the property sold to plaintiff liable to sale in execution of the decree passed in favor of the salt agent. All cost chargeable to the respondent.

THE 15TH JULY 1848.

PRESENT:

C. TUCKER Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 443 of 1847.

Special Appeal from a decision passed by Moulvee Niamut Ali, Principal Sudder Ameen of Zillah Tirkoot, September 26th, 1844; reversing a decree passed by Ali Buksh, Moonsiff of Teghra, April 9th, 1844.

DAMOODHUR BHUGGUT AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

GIRDHAREE CHOWDHREE AND OTHERS, RESPONDENTS,
(PLAINTIFFS).*

Wukeel of Appellants—Abas Ali.

Wukeel of Respondents—E. Colebrooke.

THIS case was admitted to special appeal, on the 8th September 1846, under the following certificate recorded by Mr. C. Tucker:—

‘In this case the plaintiffs, stating themselves to have been former proprietors of a 10 annas’ share of *mouzah* Secunderpoor-

Furreeda, in *pergunnah* Bulleeah, instituted the present suit against the petitioners (appellants), and the former six *annas'* proprietors of the village to recover from them a sum of rupees 52-14, paid to them by the collector of Monghyr as *malikana* on 424 *biggahs* of alluvial lands, of which a permanent settlement has not yet been made.

' They founded their claim on the following facts. The village Secunderpoor-Furreeda having been entirely destroyed by the encroachments of the river Ganges, an alluvial formation rose on the site of the destroyed village, which in the course of time became ripe for settlement; and, in the *Fussily* year 1228, the proprietors of the original estate were called upon to enter into engagements for the same with Government. On this occasion, owing to disputes with neighbouring villages in regard to portions of this alluvion, the proprietors entered into engagements with Government for 3,100 *biggahs* only; being that portion of the alluvion which was in their undisputed possession, and for which a permanent settlement was made with them at an annual *jumma* of rupees 1,101.

' The disputed portion was left for future adjustment in the hands of Government; and the collector retained it under *khas* management. That part of these 3,100 *biggahs* having again been carried away by the river, the estate fell in balance, and was sold in 1235 to recover the arrears of Government revenue due to the close of the preceding year. Mohun Dhobee became the purchaser, who afterwards sold it, at private sale, to the petitioners, and to the late proprietors of a 6 *annas'* share of the estate.

' They go on to say, that having obtained a decree in their favor under Regulation 6, 1813, for 424 *biggahs* of the disputed alluvion on 1st May 1821, they received from the collector of Monghyr their share ($\frac{1}{16}$ th) of the *malikana*, on the amount collections from 1232 to 1239 F. S.

' That, subsequently, the petitioners having represented their claims to the *malikana* on these lands to the collector, on the ground of being the proprietors of the estate to which they were attached, that officer on the 22d June 1835 admitted their claim, paid them the *malikana* then due, and referred them (the petitioners) to a regular suit in the civil court, if desirous of recovering what had been previously paid, improperly, to them (the plaintiffs). The present suit therefore is brought to cancel the collector's order, and to recover from petitioners $\frac{1}{16}$ th of the amount paid to them as *malikana* by the collector, on the ground that these lands never having been assessed and engaged for, were not included in the sale of the original estate, and consequently they retain their proprietary right therein.

‘ The moonsiff dismissed the suit, though on very unsatisfactory grounds, without going into the merits of it. On appeal to the principal sudder ameen, that officer decreed for the appellants (plaintiffs) on the ground urged in their plaint, viz. that the sale made by the collector conveyed to the purchaser no right in the lands under dispute, as they were not included in the settlement of the estate sold.

‘ It must be observed, that the only title the plaintiffs ever had to these alluvion lands, was founded on their being proprietors of *mouzah Secunderpoor-Furreeda*, which title was lost to them on the sale of the estate by the collector; and the purchaser succeeded to the entire rights of the late proprietors. This, I imagine, admits of little or no doubt. The decision, therefore, of the principal sudder ameen being in violation of a fundamental law, I admit the special appeal on the grounds stated in this paragraph.’

Under the circumstances stated in the above certificate, we are clearly of opinion that the original plaintiffs in this case lost all their right and title in the estate from the day of sale; and consequently as the *malikana* subsequent to that event paid to them by the collector, was claimed and paid to them in virtue of their having been part proprietors of Secunderpoor-Furreeda, it was improperly paid. We accordingly reverse the decision of the principal sudder ameen, and dismiss the plaintiffs’ suit. Costs chargeable to the respondents.

THE 15TH JULY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 442 OF 1847.

Special Appeal from a decision passed by Moulvee Niamut Ali, Principal Sudder Ameen of Zillah Tirhoot, September 26th, 1844; reversing that of Ali Buksh, Moonsiff of Teghra, April 9th, 1844.

DAMOODUR BHUGGUT AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

GIRDHAREE CHOWDHREE, AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

THIS case was admitted to special appeal, on the 8th September 1846, under the following certificate recorded by Mr. C. Tucker :—

‘For the origin of this case, *vide* certificate of this date on petition No. 1071 (embodied in preceding decision). This is the suit brought by the defendants in that case to recover the amount *malikana* paid by the collector of Monghyr to Girdharee Chowdhree, and others, from 1235 to 1239. It was decreed by the moonsiff, but dismissed in appeal by the principal sudder ameen ; and I admit the special appeal for the same reasons.’

From our decision of this day, in the appeal case No. 442, it will be seen that we consider the respondents’ right and title, as a part proprietor of Secunderpoor-Furreeda, ceased altogether on the sale of the estate in 1235 ; consequently the *malikana* paid to them by the collector, subsequent to that event, was improperly paid. We therefore reverse the decree of the principal sudder ameen ; and observing that the amount *malikana* claimed by the appellants is from 1232 to 1239, we amend the decree of the moonsiff, and award to the appellants’ *malikana* from the date of sale to the close of 1239.

The sum thus to be refunded by the respondents to be ascertained in execution of this decree, on reference to the collector’s office. Costs chargeable to the respondents in proportion to the amount decreed.

THE 15TH JULY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 2 OF 1848.

Regular Appeal from a decision passed by Moazum Hosein Khan, Principal Sudder Ameen of Bhaugulpore, August 11th, 1847.

RAJAH JYEMUNGAL SINGH, APPELLANT, (PLAINTIFF,) *versus*

RAJAH NIRBHEI SINGH AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellant—Pursun Komar Tagore.

*Wukeels of Respondents—Ameer Ali, Gholam Sufdur
and C. Glas.*

THIS suit was instituted by appellant, on the 19th of December 1845, to recover from respondents certain lands belonging to *mouzah* Rampore, and the entire *mouzahs* of Nurainpore and Luchmeepore, and Aher-Biskaond, agreeably to the boundaries set forth in the plaint ; with mesne profits from 1249 to 1253 *Fuslee*. Estimate for stamp Company’s rupees 23,113-0-5-1.

The claim was dismissed by the principal sudder ameen under the statute of limitation, and in the absence of evidence to appellant's more recent possession of, or right to any portion of the lands, to obtain which the action was brought.

The documentary evidence, consisting of proceedings before the local authorities, the civil and criminal courts, and collector, proved only that disputes had subsisted between the parties as to their respective rights, in regard to parts and portions of the lands contested, since 1231 F. (1824 A. D.) There were engagements, (such as leases, &c.,) also submitted, supported by some 25 depositions on oath of as many witnesses: the whole involving the full *quantum* of perjury and forgery the case was susceptible of embracing. Ten witnesses swore to the just title and uninterrupted possession of appellant for past generations, and fifteen to the same on the part of respondents. The only point satisfactorily established was the possession of the latter, of a part of the property, for some 20 years and more; which, and the want of any preponderating evidence in support of appellant's claim to the rest, formed the ground of the decision appealed against.

Concurring with the principal sudder ameen in his view of the case, I affirm the judgment passed by him; with all costs chargeable to appellant.

THE 15TH JULY 1848.

PRESENT:

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 184 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, July 21st, 1845; reversing a decree passed by the Sudder Moonsiff, February 21st, 1844.

NITTANUND SEIN, APPELLANT, (DEFENDANT,)

versus

NUDDEARCHUND, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—J. G. Waller.

THIS case was admitted to special appeal, on the 1st March 1847, under the following certificate recorded by Mr. C. Tucker:—

‘In this case the plaintiff sued the petitioner (appellant) for a balance of rent on account of the years 1248 and 1249 B. S., at the rate of 7 rupees per annum, at which rate he alleged the petitioner held the lands under a *cubooleent* dated in the year 1238, and at which rate he had paid to the close of the year 1247. The defendant denied the claim; and pleaded he held the land under a *mowroosee jumma* of rupees 3-8 per annum. Neither party could substantiate their pleas; and the moonsiff decreed for plaintiff at rupees 3-8 per annum, merely because the petitioner admitted that sum to be the rent which he had not paid.

‘In appeal, the principal sudder ameen entered into various enquiries to ascertain what the *jumma* ought to be; and, amongst others, deputed the judge’s *nazir* to ascertain the rate of other lands in the same *bazar*; and on this he decided, giving the plaintiff a decree in full at the rate of 7 rupees per annum.

‘I conceive the principal sudder ameen mistook the issue entirely. The plaint was not to fix the petitioner’s *jumma*, but for a balance of rent on a specified *jumma*, which it was for the plaintiff to prove; the more so as he set forth in his plaint that the petitioner had paid rent from 1238 to 1247 at the specified rate of 7 rupees per annum, so that he ought to have had no difficulty in proving the assertion to be true. Instead of which, the court fixes the *jumma*, and then awards past years’ rent at that *jumma*. Conceiving this to be contrary to every principle of law, I admit a special appeal to try whether the principal sudder ameen has not, in disposing of this case, acted contrary to the principles of justice and the custom of the courts.’

Under the circumstances above stated, we are of opinion that the case should be remanded to the principal sudder ameen to take evidence as to the actual annual payments in past years, viz. from 1238 to 1247, which is the foundation of the plaintiff’s claim. We accordingly direct that the proceedings be returned to the principal sudder ameen for the above purpose.

THE 15TH JULY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 61 OF 1848.

Special Appeal from a decision passed by the Acting Judge of Zillah Nuddea, December 19th, 1845; altering a decree passed by the Principal Sudder Ameen of the same Zillah, June 26th, 1843.

MUTHOORANATH MOOKERJEE, APPELLANT, (DEFENDANT,)

versus

SREE HURREE BANERJEE AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

Wukeels of Appellant—Gholam Sufdur and Shibnurain Chatterjee.

Wukeels of Respondents—Pursun Komar Tagore, E. Colebrooke, Bunsee Buddun Mitr, and Rampran Raee.

THIS case was admitted to special appeal, on the 13th July 1847, under the following certificate recorded by Mr. C. Tucker:—

‘ In this case one Trippoorá Soondree was the original plaintiff, succeeded first by her daughter, and on her death by her nephew Sree Hurree Banerjee. She stated that on 7th Poose 1234 B. S., she had lent the sum of 1,000 rupees to three persons (Kishen Mohun Paul, Gunga Govind and Petumber) and on the 17th of the same month a further sum of 1,000 rupees, taking a separate bond for each. That she went to Benares in 1238 B. S.; and on her return was informed that her three nephews (Muttooranath, Nubkishen and Ramchunder) had realized the above sums due to her, by means of a purchase they had made of an indigo factory from Kishen Mohun; the amount due to her having been deducted from the purchase money. That, nevertheless, she called

upon Kishen Mohun and others to repay the money they had borrowed from her, when her three nephews came and acknowledged having received the amount, and promised to make it good to her; and did then pay 200 rupees, that is 100 in part of each bond. This was in *Phalgun* 1242 B. S.; but not receiving any thing more, she instituted this suit for the balance due on the first bond, against the three borrowers and her three nephews. The nephews denied the whole; said they knew nothing of the alleged loans, and that they had paid the full sum agreed upon for the indigo factory purchased by them from Kishen Mohun and others. Petumber, one of the original borrowers, corroborated the statement of the plaintiff. The principal sudder ameen decreed against the three nephews. On appeal the judge amended the principal sudder ameen's decision, and decreed against both the original borrowers and the three nephews.

'It is clear from the foregoing statement, that the dispute between the original borrowers and the three nephews could not be adjudicated in this case, and that a decree could pass against the original borrowers only. No document whatever in support of their statement was produced; and even were it otherwise, they must be held responsible to the plaintiff; and if they have any claim against the three nephews, they should sue them separately.

'I admit a special appeal, the decree of the principal sudder ameen, and so much of the judge's as awards payment against the three nephews, being clearly contrary to law and practice.'

The sole point for the Court's decision under the certificate, is the liability of the appellant. We find that the principal sudder ameen in his decree declares that the transfer of the debt to the appellant, and the payment by the appellant of part thereof to have been fully proved. In this point the judge concurs with the principal sudder ameen; but not considering the original debtors to have been exonerated by any act of the plaintiff, he decreed against both the original debtors and the nephews of Trippoor Soondree.

On these grounds therefore, viz. the proof of the nephews having received credit for the amount in payment of the indigo factory purchased by them from Kishen Mohun Paul, and of the nephews having paid a portion of the debt to Trippoor Soondree, we are of opinion that they are liable. The joint liability of Kishen Mohun Paul and others is not before us, for they did not prefer a special appeal from the judge's decision. We therefore dismiss the appeal with costs.

THE 18TH JULY 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 231 OF 1846.

Regular Appeal from a decree passed by Moulvee Syud Abdool Wahid Khan, Principal Sudder Ameen of Moorshedabad.

NUBKISHWUR BISWAS, APPELLANT, (PLAINTIFF,)

versus

RAMJOY GHOSE, RESPONDENT, (DEFENDANT.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondent—Pursun Komar Tagore.

- SUIT and appeal laid at Company's rupees 8,531 (sum principal and interest) paid for a purchase, which was eventually decreed invalid, after nearly 24 years possession on a decree declaring it valid.

The appellant's narrative is that he paid the sum of Company's rupees 4,265-0-8 as price of a 2 *annas*' share to the maternal grandmother of respondent, to enable her to recover by suit an 8 *annas*' share of a landed estate left by her husband, as heir of one of two of her sons, (who had died unmarried after succeeding his father) and from which she had been ousted by the mother of respondent, the widow of her younger son, father of respondent, and for the necessary expenses of the said maternal grandmother. The suit was instituted, and a decree obtained on mutual consent for 5 *annas*. The grandmother refused to fulfil her engagement; and appellant sued her, and obtained a decree, confirmed in appeal and special appeal, and possession of the said 2 *annas* was given in execution. After a lapse of nearly 24 years, the respondent sued to cancel the sale, on the ground that under the Hindoo law the grandmother had no right to sell, having a grandson alive; and that she had other means of subsistence, and therefore was under no necessity to sell. A decree cancelling the sale and dispossessing appellant was eventually obtained; and special appeal rejected by the Sudder Court, because the present respondent was not a party in the first case, although the cause of action was the same, and the same plea urged, and a legal opinion of the *pundit* taken on the very point at issue, the validity or otherwise of the sale. The appellant therefore now sued for recovery of the purchase money, with interest equivalent to principal from respondent, who had inherited the estate in question, and other property from the grandmother.

The defence denied the inheritance of the estate from the grandmother, or of any property from her; and, in appeal, added that

appellant having been in possession of the invalid purchase nearly 24 years, had recovered, over and over again, his purchase money. The principal sudder ameen rejected the claim against the defendant, on the ground that when the sale was declared invalid by the court, in his (defendant's) suit against plaintiff, no option was given to plaintiff to sue for recovery of the purchase money: consequently, it would be interference with the decree in that suit to decree it now. But he gave a decree to plaintiff for the claim, with costs of suit against property left by the grandmother, which was her own (*stridhun*); releasing the defendant from all responsibility. The claim is therefore decreed against property existing or not existing, and against some body or no body; at any rate against no body before the Court.

A final decision having declared the sale to appellant by the grandmother invalid, no claim for recovery of the purchase money from the property itself can be admitted. However, if respondent has inherited any property, real or personal, from the grandmother, which was her own, he is certainly liable for the debt incurred by the grandmother, and due by her. This point the principal sudder ameen will fully investigate, and then decide. Case remanded.

THE 19TH JULY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 523 OF 1846.

IN the matter of the petition of Muheema Chundur Chowdhree, filed in this Court on the 6th August 1846, praying for the admission of a special appeal from the decision of Mr. Henry Swetenham, judge of zillah Dacca, under date the 8th May 1846; affirming that of Moulvee Mohummud Idris, principal sudder ameen of the said zillah, under date the 12th December 1844, in the case of Bishenath Raee and Sustee Booshun, plaintiffs, *versus* Muheema Chundur Chowdhree, defendant.

This was a suit to recover possession of a moiety of certain *jote jummas* alleged to have been sold to the plaintiff, Bishenath Raee, in 1230 and 1237 B. S.

The suit was instituted on 27th Bhadoon 1250 B. S.; but the plaintiffs alleged they had been in possession up to 14th June 1843, corresponding with 1st Assar 1250 B. S., when in a case under Act 4 of 1840, possession was given to the defendant. The details of this case will be found at page 2 of the zillah decisions for zillah Dacca, for the month of May 1846.

The decision under Act 4 of 1840 is *prima facie* adverse to the plaintiffs' plea of previous possession, and therefore it was incumbent on the courts in this case to enquire minutely into that point; because, if not established, the law of limitations would oppose a bar to the hearing the suit at all both,—the *kubalas* on which the plaintiffs found their title bearing date more than 12 years before the suit was brought. As, however, this point has not been enquired into by the principal sudder ameen, whose decision was affirmed by the judge, I annul both decisions as incomplete, and remand the proceedings to the present principal sudder ameen, who will require of the plaintiffs evidence to their previous possession within a period of 12 years preceding the institution of the suit; and should this point be established to the satisfaction of the principal sudder ameen, he will then proceed to dispose of the case on its merits.

THE 19TH JULY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 180 OF 1848.

IN the matter of the petition of Jhuboo Shah, filed in this Court on the 3rd June 1848, praying for the admission of a special appeal from the decision of Gholam Usghur, principal sudder ameen of Dinagepore, under date the 23rd March 1848; reversing that of the moonsiff of Rajarampore, under date 29th June 1847, in the case of Madhub Shah, plaintiff, *versus* the petitioner and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff sets forth in his petition of plaint, that he and his brother, Sooruj Shah, had two holdings, as tenants in two villages, held by them jointly. That Sooruj Shah gave up his share of them to his brother, the plaintiff, who alone held possession from 1250 B. S.; but that he was ousted in 1253 by the defendant, Jhuboo Shah, from the moiety formerly held by Sooruj Shah.

The defendant, Jhuboo Shah, answers that the entire holdings were pledged to him by the two brothers, Madhub Shah and Sooruj Shah, on borrowing from him the sum of 29 rupees. That Madhub Shah paid his half of the debt; but that Sooruj Shah being unable to pay his moiety, gave up the half of the holdings to him.

The moonsiff dismissed the plaint, but his decision was reversed by the principal sudder ameen.

The principal sudder ameen observes in his decree, that the transfer of the *jotes* to the defendant should have been registered in the zemindar's office. This is nothing to the purpose as it affects the transaction between Sooruj Shah and the defendant, supposing the transfer to the latter actually to have been made. The principal sudder ameen, moreover, lays some stress upon the evidence of Sooruj Shah, who was examined as a witness for the plaintiff: in other words, the debtor was examined as a witness in his brother's suit to a denial of his own debt. This is inadmissible, and the evidence is good for nothing. Further, the principal sudder ameen does not appear to have made any enquiry in regard to the pledge to the defendant, Jhuboo Shah. *Prima facie* the case appears to be one of collusion between the two brothers, Madhub Shah and Sooruj Shah, to evade the defendant's claim upon the latter, and should have been thoroughly investigated. The enquiry in the principal sudder ameen's court appears to have been very superficial; and I admit the appeal and remand the case for further enquiry and decision *de novo*, with reference to the foregoing remarks.

THE 19TH JULY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 195 OF 1848.

IN the matter of the petition of Pursnath Chowdhree and others, filed in this Court on the 15th June 1848, praying for the admission of a special appeal from the decision of Mr. W. Luke, acting judge of East Burdwan, under date the 11th March 1848; altering that of the sudder ameen of East Burdwan, under date 24th July 1847, in the case of Juggut Mohunee Dassee, plaintiff, *versus* Pursnath Chowdhree and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The following is the decree of the zillah judge in this case :—

‘The plaintiff sued to enhance the rent of *biggahs* 212-11 of land from the year 1252 B. S., fixing the rate rupees 475-12-9 annually. The defendants urge, in reply, that the land will not yield a better rate than that now fixed on it; and that the rate of a portion of it having been previously determined, in a suit instituted by plaintiff's predecessor *versus* Manick Koowur, it is not open to revision.

‘The sudder ameen observes, from the testimony of witnesses, enquiry on the spot, and the *nericknameh*, that the present rates should yield an annual rent of rupees 345-15-12-1, or an increase on the *jumma* hitherto paid by the defendants of rupees 139-4-14-1. He is of opinion that in equity the plaintiff is entitled to an enhanced rent to the extent of one-fourth the increase above stated; that is to the sum of Sicca rupees 33-7-18 in excess of the *jumma* the defendants have hitherto paid, and decrees accordingly.

‘I cannot concur in the view he has taken. In the first place, the rate of *biggahs* 51-4-14 of the land now in dispute, was decided in the suit alluded to by the defendants some years ago, and cannot now form the subject of investigation. Again, he assigns no reason for limiting the demand of plaintiff to one-fourth of the rates exhibited in the *nericknameh*; nor for assuming the rates on which his calculations are based are correct, opposed as they are to the *nericknameh* filed in Manick Koowur’s case, which defendants admit in their reply to be just. I am of opinion that the most equitable mode of adjusting the plaintiff’s claim to be that adopted by the court in the case before mentioned, viz. by adding the *jumma* previously paid by the defendants to that exhibited in plaintiff’s *nericknameh*, which exactly corresponds with the *nericknameh* filed in the case of Manick Koowur, and assuming a moiety of the aggregate amount as the fair *jumma*. The *jumma* of the 51-4-14 *biggahs*, previously fixed by a decree, cannot now be disturbed; and, according to calculation on the aforesaid principle, the plaintiff is entitled to an enhanced *jumma* from the year 1252 B. S., at the rate of Company’s rupees 236-12-7 annually. The decision of the lower court is therefore modified to this extent, but affirmed in other respects, and the appeal decreed with costs.’

The judge’s decision is imperfect, and his basis of calculation cannot be admitted; for it does not appear that the decree respecting the 51 *biggahs*, 4 *cottahs* was ever carried into execution, or is any thing more than a dead letter to the present day.

The suit is to enhance rent upon certain holdings in the possession of the defendants, obtained by them at different dates; but subsequently amalgamated into one at a total *jumma* of Sicca rupees 210-6. Now, the *first* question which the zillah courts have to decide is, whether the lands are liable to enhancement of rent; and, if they are, *secondly*, to what extent? On the first point I find no distinct opinion, nor any allusion to the nature of the tenures held by the defendants. In regard to the second point, if the lands are declared liable to enhancement, the assessment must be made according to the *pergunnah* rates, which the judge must ascertain by enquiry.

I accordingly admit the appeal, and remand the case for further investigation and decision *de novo*, with reference to the foregoing remarks.

It is scarcely necessary to remark, that a decree declaratory of a landholder's right to enhance his tenant's rent, does not necessarily compel the tenant to pay such enhanced rent in the absence of a notice under Sections 9 and 10, Regulation 5, 1812; and that no payment can be compulsory beyond the amount specified in the notice.

THE 19TH JULY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 184 OF 1848.

IN the matter of the petition of Musst. Seetul Munnee Dibbea, filed in this Court on the 5th June 1848, praying for the admission of a special appeal from the decision of Mr. G. C. Cheape, judge of zillah Rajshahye, under date the 26th March 1848; affirming that of the principal sudder ameen of Rajshahye, under date the 28th July 1846, in the case of Doorga Das Buttacharjah and others, plaintiffs, *versus* the petitioner, defendant.

It is hereby certified that the said application is granted on the following grounds.

The following decree of the judge sets forth the particulars of this case.

'Claim for possession of 101 *biggahs birmotur* land, situate in *mouzah* Cheraile, *pergunnah* Katturmal, together with mesne profits: suit laid at rupees 1,495.

'This suit was instituted by the respondents, who claimed the land as having been given by Ranee Bhowanee to their ancestor, Deenonath Bhuttacharj, who with his brother had been seised of the land. In 1242 B. S., appellant dispossessed them of 50 *biggahs* of this land; and when they were about to sue, the Government came in and resumed the whole. The special deputy collector decreed the land liable to resumption; but his order was reversed by the special commissioner, who declared it to be *lakhiraj*, and directed its release from attachment in 1248 B. S., when the appellant, who had been placed in charge (*zimma*) of the land, dispossessed them of the remaining 51 *biggahs*: hence this suit. The principal sudder ameen held the plaintiffs' claim to be fully established, and gave them a decree adjudging possession and mesne profits from the date of dispossession. Against this decision the appellant appeals, pleading, *inter alia*, that both she and her husband before her were all along in possession as *putneedars*; and as the revenue authorities had under Regulation 7 of 1822, first made a settlement with her, and had on releasing the

lands by order of the special commissioner given her possession, and all the profits, the civil courts could not disturb her possession.

‘ The appeal was admitted on the 12th August last ; and as the principal sudder ameen had not distinctly stated from what date mesne profits were to be calculated, (and which was necessary as the plaintiffs complained that they were first ejected of 50 *biggahs*, and then of 51 *biggahs*), he was called upon to explain. The whole of the proceedings have on different dates been read ; and it may be as well here to advert to the claims the parties respectively have to possession. The appellant’s husband’s father obtained the *putnee* from the zemindar, who at a sale for arrears of revenue purchased the *pergunnah* in which the land in dispute was situated, and which had before belonged to Raja Ramkanth, the husband of Ranee Bhowanee. This purchaser only purchased what had been assessed by the revenue officers at the decennial settlement, - and in granting a *putnee* to the appellant’s husband’s father could only make over such land as was liable to the payment of revenue, or was *mal* ; and by the *putnee* the *putneedar* acquired no title to land that was *lakhiraj*, or might be declared liable to resumption on account of any defect in the *lakhirajdar’s* title. The appellant lays much stress on the fact of a settlement having been made with her by the collector, but strange to say this settlement seems to have been made subsequent to the special commissioner’s order for releasing the land from attachment, as that order bears date the 24th August 1841, and the special deputy collector’s the 2d June 1842. Thus, whatever settlement *may* have been made, was *subsequent* to the order for the release of the lands, and can avail appellant nothing ; and more, the order of the special commissioner is merely to the effect that the land is to be restored to the parties who were in possession, *kabeeza zumeen*, neither the appellant nor any other person being named. It is therefore clear that the right to possession was not decided by the special commissioner, or revenue authorities, though, *incidentally*, the respondents’ claim is adverted to in his decree. With regard to respondents, they appealed the case to the special commissioner to establish that the land was *lakhiraj*, producing the *sunnud* their ancestor had obtained from Ranee Bhowanee, who created the *birmotur* tenure. The special commissioner ruled, that under that *sunnud* the title to 101 *biggahs* *birmotur* land was vested in the heirs of Deenonath Butta-charj, whose heirs the respondents assert they are. It therefore follows, that if they can establish previous possession, they are entitled to recover. The principal sudder ameen considers this fully established, and I concur. The decision appealed from is therefore affirmed, with this addition (with reference to the explanation contained in the principal sudder ameen’s *roobukaree* of the 24th November 1847) that the mesne profits of 50 *biggahs* be calculated

from the month of *Bysack* 1242 B. S., and of 51 *biggahs* from the month of *Bhadoo* 1248 B. S., but not more than rupees 415 (the sum claimed in the plaint) to be awarded, this to the date of the institution of the suit; and from that date to the time possession be given to the respondents, they will be entitled to whatever may, on enquiry, be the *wasilat*, or mesne profits, of the land decreed in their favor. All costs of the present appeal, and in the original suit, are made chargeable to appellant.'

The special appeal is applied for on two points :—

First. That whereas the plaintiffs set forth in their petition of plaint that they were dispossessed of the lands on two separate dates, two separate actions should have been brought, and that therefore they should have been nonsuited.

Secondly. That whereas the defendant pleaded that the plaintiffs had not held possession of the lands for nearly half a century, the decisions of the lower courts were defective, inasmuch as enquiry into this point had not been made. The first reason I consider to be bad. The precedent in the case of *Ram Ruttun Raee* and others (page 114 of the summary cases, decided August 2d, 1847) settles this point. Where there is an unity of title, as in this case, dispossession on various dates is no bar to a single action.

The second reason is good for further enquiry. The judge says :— ' If the plaintiff can establish previous possession, they are entitled to recover. The principal sudder ameen considers this fully established, and I concur.' It does not appear, however, what evidence the principal sudder ameen took upon this point; and the judgment written by himself is silent upon the subject.

I accordingly admit the appeal; and remand the case in order that if enquiry in regard to possession has been made, the nature of the enquiry and of the evidence may be recorded in the decree; and if not, that it be now made, and the case decided *de novo*.

THE 19TH JULY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 188 OF 1848.

IN the matter of the petition of *Ram Kunhye Chuckerbuttee* and others, filed in this Court on the 7th June 1848, praying for the admission of a special appeal from the decision of Mr. H. Swetenham, judge of *Dacca*, under date the 7th March 1848; reversing that of the principal sudder ameen of *Dacca*, under date

20th January 1846, in the case of the petitioner, plaintiffs, *versus* Sumbhoonath Holdar and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The following is the judge's decree in this case.

'Suit to recover possession of land, valued with mesne proceeds at rupees 1,500.

'The cause of this action is a boundary dispute. Plaintiff states a *khal* divides his land from the defendants': defendant admits the fact. The point at issue is the locality of the said *khal*; one *khal* now only exists, which defendant states is the boundary; but plaintiff maintains the *khal* was situated to the northward thereof; that it has filled up, and the place thereof is marked by an *acel*. Defendant's *talook* is called Gorakandee. It was purchased at public sale by Sumbhoonath on the 11th *Aghun* 1239: he was put in possession by the moonsiff. Tarapurshaud purchased the said property from Sumbhoonath.

'The following were the points noted for adjudication by the principal sudder ameen.

'First, has the time for suing lapsed?

'Secondly, which of the lines is the boundary of plaintiff's lands, that marked A, or that marked B,—referring to the map prepared by the ameen.

'The principal sudder ameen observes the plaint is dated 29th *Aghun* 1251. Defendant alleges Sumbhoonath obtained possession on the 11th *Aghun* 1239; the lapse is 18 days in excess of 12 years; but plaintiff complained of forcible dispossession of the lands in dispute in the criminal court, on the 20th *Poos* 1241, on which occasion Sumbhoonath was fined; therefore the suit is not barred.

'Secondly, from a *ruffanameh* (which has not been verified) it appears the *khal* was cut by the ancestors of the parties half a century since. It is not impossible the *khal* may have filled up; and from the boundaries specified in a *howla pottah*, filed by the plaintiffs, which has been proved a *de facto* tenure, he considered the line claimed by plaintiff the correct boundary; and accordingly decreed the claim, 20th January 1846.

'Taraparshad, the only person of all the defendants actually concerned in the case, has appealed; and filed (what he states he could not find to lay before the lower court) copy of the orders on appeal from the magistrate's decision on the forcible dispossession complaint. It appears (on appeal from the magistrate's order, dated 3d January 1835) on plaintiffs' petition, 20th *Poos* 1241, the officiating commissioner, Mr. Lowis, on the 14th December 1835, called for a report from the moonsiff above noticed, whether the land under dispute was, or was not, within the boundaries he had

defined, on giving possession of the land purchased at public sale by Sumbhoonath; and whether he had, or had not given possession of that land to Sumbhoonath. The moonsiff's answer being in the affirmative on both points, the commissioner gave his opinion that Sumbhoonath had not been proved to have forcibly dispossessed the plaintiff, and he reversed the magistrate's orders, directing also a refund of the fine.

'Under these circumstances, in considering whether the suit were barred by the statute of limitations, the ground of action must be held to have originated the 11th *Aghun* 1239, which will make a period to the date of institution of the suit (viz. 29th *Aghun* 1251) of 12 years and 18 days. In fact the plaintiff sues for *wasilat* from the beginning of *Bysakh* 1240, the date of confirmation of the moonsiff's *rooeedad*.

'The suit being barred by the statute of limitations, the decision of the principal sudder ameen is reversed and the appeal decreed. Respondents to pay the costs of both courts.'

The judge takes the 11th *Aghun* 1239, as the date from which the period allowed for institution of suits is to be calculated. In one part of his decree it is stated to have been the date of public sale, in another that of the purchaser getting possession. The latter appears to be correct. That the purchaser, however, got possession of the disputed lands at the same time that he obtained possession of the estate purchased at public auction, as a portion thereof, depends entirely upon the report of a moonsiff, which is altogether insufficient evidence of that fact. If the plaintiffs can shew that they have been in possession of the disputed lands, at any time within a period of 12 years antecedent to the institution of the suit, they are entitled to be heard on the merits.

I accordingly admit the special appeal, and remand the case in order that the judge may consider the evidence upon this point. Should it be proved by the evidence that the plaintiffs have had possession at any time within 12 years, the judge will proceed to try the case upon its merits as to whether the lands are comprised in their, the estate of the plaintiffs, or that of the defendants.

THE 20TH JULY 1848.

PRESENT :

A. DICK, Esq.,
JUDGE.

CASE No. 250 OF 1846.

*Regular Appeal from a decree passed by Hur Chundur Ghose,
Principal Sudder Ameen of Zillah 24-Pergunnahs.*

MUSST. BAMA SOONDREE, MUSST. BISHOON MAYEE;
AND THEN THE LATTER, AFTER DECEASE OF FORMER, AS
GUARDIAN OF RAM CHUNDER MITR, ADOPTED SON OF
BAMA SOONDREE, APPELLANT, (DEFENDANT,)

versus

* NURAIN KISHOON SINGH, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Abas Ali.

Wukeel of Respondent—Rama Purshad Raee.

SUIT and appeal laid at Co.'s rupees 8,306-3-13-1, for possession with usufruct on *talooks* and rent-free lands, &c., by right of inheritance. The plaintiff, respondent, rested his claim on right as heir of his first cousin's son (who had died childless) after the death of that person's mother, who had inherited from him in preference to the defendants, Bama and Bishoon, sisters of that person, his cousin's son. The sisters, defendants, denied the claim on divers grounds. At length a compromise was effected, on which a decree was given by the principal sudder ameen; 5 shares to the sisters, and 11 shares to plaintiff, out of 16 shares of the whole property in suit.

Subsequently, the sisters learning that the Hindoo law was with them, repudiated the compromise, and petitioned to that effect. The principal sudder ameen, after investigation, finding that Bishoon had not been present, or taken part in the compromise, applied to the Sudder Court for permission to admit a review. The Sudder Court (present: Mr. C. Tucker), directed the defendants to appeal if dissatisfied: hence this appeal. The appeal rests on the invalidity of the compromise, in consequence of one of the parties to it having taken no part in it.

The respond to the appeal relies on the fact of the deed of compromise having been duly filed and acknowledged by the constituted pleaders of the parties, and therefore binding on them. Further, that if the compromise be set aside, the respondent is entitled to a decree in full of his claim, because the defendants are not heirs of their mother to property derived from her son, sisters never inheriting from brothers.

Since the plaintiff designated in his plaint as the real defendants, both Bama and Bishoon, and declared both to be in possession, and both to having attempted to deprive him absolutely of his right and title to the property, the compromise cannot be considered valid, after proof that Bishoon was not present, or took part in it. Therefore the case is remanded for full investigation into its merits.

THE 20TH JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 698 OF 1846.

IN the matter of the petition of Doorgapursaud Rae and others, filed in this Court on the 16th September 1846, praying for the admission of a special appeal from the decision of the judge of Backergunge, under date the 26th June 1846; reversing that of the principal sudder ameen of that district, under date 12th May 1845, in the case of Hurroosoondree, widow of Gopeekishen Rae, plaintiff, *versus* Doorgapursaud and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

This case was admitted to special appeal by Messrs. Tucker and Reid, 3d August 1842; and, on being brought on the file of the Court, was disposed of by Mr. A. Dick on the 3d of June 1844, who directed it should be returned for trial to the principal sudder ameen; who was instructed 'to call upon both parties to produce witnesses (*i. e.*, their *omlah*, and *ryuts*, and neighbours,) to testify to the union or division of the shares, and to file exhibits, &c.' The case accordingly came on before the principal sudder ameen.

It appears from the record that Nund Kishore and Ruttun Kishore were two brothers, sons of Munohur Rae, the proprietor of a 2 annas' share of *tuppah huveelee* Suleemabad. The brothers, on the death of their father, succeeded to equal shares of the estate. Gopeekishen, the husband of plaintiff, and son of Ruttun Kishore, claiming a $6\frac{1}{2}$ gundah's share of his father's estate, instituted this suit against Doorgapursaud and others, sons of Nund Kishore, for possession and *wasilat*, and also for a division of the estate.

The defendants urge that Nund Kishore and Ruttun Kishore, in 1194, made a division of their father's estate, reserving 50

biggahs to Nund Kishore as being the eldest son, and a certain portion, which could not be divided, to be held jointly.

The principal sudder ameen dismissed the plaint, relying on the division and adjustment which took place in 1194.

The judge [page 29 of zillah decisions of Backergunge for June 1846,] says he is disposed to allow that Nund Kishore and Ruttun Kishore did effect a private, *though only a partial butwareh* in 1194. He considers the plaintiff (now respondent) 'entitled to have the unfettered occupancy of his own individual share, and this it is impossible to invest him with, except by dividing his share upon the principles which the law has prescribed. Reserving the question as to the 50 *biggah's jeshtooter* to be tried by due course of law, he reversed the decree of the principal sudder ameen, and declared the plaintiff's right to have his $6\frac{1}{2}$ *gundah's* share of half the estate formally separated by *butwareh*. Against this decision Doorgapursaud Rae and others have presented an application for the admission of a special appeal on three grounds:—

First, the law of limitation, inasmuch as the division and adjustment in 1194, between the ancestors of the parties, being final and binding on them, no suit can after the lapse of so many years be brought by their heirs to interfere with, or to reverse its provisions.

Secondly, the inconsistency of the judge's decision, by which the *jeshtooter* lands are at one time excluded, and the right to them reserved for future adjudication, and at another the same *jeshtooter* lands are included in the $6\frac{1}{2}$ *gundah's* share to be formally separated by *butwareh*.

Third, the irregularity of the plaint, inasmuch as all the sharers in the 4 *annas'* share of *tuppah huveelee* Suleemabad, still a joint estate, should have been made parties to the suit.

We are not prepared to rule that a private division of lands between sharers may not, under certain circumstances, be a bar to an application for a formal partition by the collector under the general provisions of Regulation 19 of 1814; though, under some circumstances, the parties, or either of them, might be entitled to demand an allotment of the Government *jumma* on the lands held by them respectively, such as is allowed to the holders of specific *mehals* by Section 30 of the above Regulation.

But the fact of a division having actually taken place in 1194 between the fathers of the parties to this cause, is not clearly laid down by the judge. He says, 'I am disposed to allow that Nund Kishore and Ruttun Kishore did effect a private, though only a partial partition in 1194.' This we do not consider sufficient. He should have stated distinctly whether the division between the sharers was or was not proved,—have shewn the grounds of his judgment on that point,—and, further, have recorded the conditions and nature of the adjustment between them. In

the absence of these particulars, the judge's decision is defective ; and the omissions must be supplied, inasmuch as the case hinges chiefly on the proof and nature of the agreement entered into.

The plea of limitation we hold does not apply to this case. It must be decided on other grounds,—on the evidence adduced in proof of the alleged private partition, the nature and extent of such partition, and proof of its having been carried out and adhered to by the parties to the present time.

We observe that plaintiff claims as his own share $6\frac{1}{2}$ *gundahs* in the 1 *anna* share, which formed the entire estate left by Ruttun Kishore. The judge declares him entitled to have his share formally separated, and nevertheless excludes from the operation of the *butwareh* which he orders to be made, the *jeshtooter* lands, reserving the question of right to them for future adjudication. This we consider an inconsistency ; and direct that on re-trial he will enquire into the respective claims preferred to them, and decide accordingly.

The third ground of objection raised by the appellants, is, want of parties. This objection was urged in answer to the plaint ; but the case has been disposed of without any record of the Court's opinion thereon. It was noticed by the deciding judge of this Court in 1844, when the whole case was opened up and was before the Court, as the restrictive rules of Section 7, Act 3 of 1843, by which the points recorded in the certificate are alone cognizable on trial after admission of special appeal were not held to be applicable to cases of special appeal admitted previous to that date. Moreover, the judge who returned the case for further investigation, limited the principal sudder ameen's enquiry ' to the union or division of the sharers ' ; and that was, under the Court's Construction No. 1073, dated the 10th February 1837, the only point on which that officer could pass judgment. Under these circumstances, we are of opinion that this objection cannot now be entertained. It may, however, be necessary, in the further investigation of the case now remanded, to bring in the proprietors of other fractional portions of the *pergunnah*, holding under separate and distinct engagements with the Government, the lands appertaining to whose estates are said to be mixed up with those of the 2 *annas*' portion. We therefore direct that permission be granted to the respondent to summon them as defendants, should such a measure be called for. The judge will, with reference to the points above indicated, try the case again and dispose of it on its merits.

Sir Robert Barlow would further add, if the agreement and division between Nund Kishore and Ruttun Kishore be not proved, the plaintiff is entitled to a *butwareh* ; if, on the other hand, it be proved, and the conditions of it are shewn to be such as would have precluded their withdrawing from it, still the interference of the courts would not be barred should an infringement of the condi-

tions by either of the parties *now* before us, at any subsequent period, be established. Now, the respondent distinctly sets forth in his plaint that the appellant's father did raise a question as to the right of his, respondent's father to rents on certain lands, on the ground of disputes as to title under the alleged division, and Ruttur Kishore was in consequence nonsuited and directed to sue for a *butwareh*.

This point does not appear to have been noticed by the court below, and is of considerable importance in deciding as to the justice of interfering with the division alleged to have taken place in 1194.

THE 22^D JULY 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 129 OF 1847.

*Regular Appeal from a decision passed by Moulvee Looft Hosein,
Principal Sudder Ameen of Jessore.*

RAM GOPAL MOOKERJEE, APPELLANT, (PLAINTIFF,)

versus

NEEL MADOBÉ GHOSÉ, GUARDIAN, AND OMESH CHUNDUR GHOSÉ, MANAGER OF RAJAH INDOO BHOOSUN DEB RAEE, MINOR, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondents—Pursun Komar Tagore.

APPEAL laid at Company's Rupees 2,248-10-5, amount dismissed out of a claim for Company's Rupees 5,698-8, principal and interest, balance of rent due.

The plaintiff took in lease a portion of the minor Rajah's estate from the court of wards for 10 years, from 1242 to 1251 B. Æ. The Ranee, mother of the minor, claimed to hold certain *mehals* situated within the leasehold of plaintiff at a fixed *jumma*, or rent of Sicca Rupees 315-9; and her servants paid plaintiff in 1242 B. Æ., 50 rupees; and in 1243 B. Æ., 40 rupees. The Ranee died in 1244 B. Æ. The plaintiff then suspecting the validity of the fixed rent tenure, attempted to obtain possession of the *mehals*; and the dis-

pute came before the collector and commissioner, and plaintiff was informed he must receive the rent offered, or he might institute a regular suit to cancel the tenure, but no summary award could be passed by the revenue authorities for its annulment. The plaintiff neither received the rent, nor instituted any suit. On the 23d February 1846, he was warned by order of the collector, that if he did not come and explain why he had not received the amount due to him, and apply for it, he would henceforth have no claim to interest. Plaintiff did then petition to have payment of principal and interest, and filed an account, but the collector rejected his claim for interest; hence this suit. The defence contested only the right to interest. The principal sudder ameen rejected the plaintiff's claim to interest for the period antecedent to the order of the collector, because the non-payment of the rent was occasioned by plaintiff's own neglect and refusal; decreeing in his favor the whole of the principal with interest from the date of the collector's order, responded to by plaintiff.

The appeal is founded on the precedent of the Sudder Court dated August 7th, 1820, (printed pages 48-49, volume III. Sudder Reports) which ruled that the Regulations did not warrant a refusal to award interest on the ground of delay. On the part of respondent, the decision of the Sudder Court dated 6th May 1836 (page 67, volume VI. Sudder Reports) was cited, and urged as more in point.

It is evident from the documents filed, that appellant was informed in 1840 and 1841, by the collector and commissioner severally, that the rent specified only could be given him, and that he might receive it or not as he pleased; and if he pleased he might sue to annul the alleged fixed tenures. He did neither. Moreover, he neither sued summarily for his rent, nor instituted a regular suit to annul the tenure. The fault of non-payment therefore rests solely with him. The precedent cited for him cannot avail; for in that case, as properly noted by the judges, the interest was due on express stipulation. That case can form no precedent for delay in suing for rent; because rent is payable yearly, and summary suits for enforcing its payment are the proper and expressly provided remedies. Besides which, the evil of long delay is great in such cases, because as rents are payable by instalments and annually a vast number of receipts or documents are requisite to meet a long protracted demand for rent, on which account the decision cited for respondent has a sound foundation. Appeal dismissed with full costs.

THE 22D JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 101 OF 1848.

Special Appeal from a decision passed by Mr. J. Reily, Principal Sudder Ameen of Hooghly, May 18th, 1847 ; reversing a decree passed by the Sudder Moonsiff of that District, July 15th, 1836.

KISHEN CHURN CHUCKERBUTTEE AND OTHERS,
APPELLANTS, (PLAINTIFFS),

versus

BYKUNTH NATH GOSAIN AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeels of Appellants—Kishen Kishore Ghose and Govind Chundur Mookerjee.

Wukeel of Respondents—None.

THIS case was admitted to special appeal, on the 29th September 1847, under the following certificate recorded by Mr. C. Tucker, Sir R. Barlow and Mr. J. A. F. Hawkins:—

‘ On the 2d July 1833, Mr. David Smyth, judge of Hooghly, decreed possession of 2½ *cottahs*, in village Malepara, to the defendants, and ordered payment to them of 2 *annas* per annum rent by the plaintiffs. They allege the defendants did not put that decree, confirmed in the Sudder Dewanny Adawlut on the 25th January 1836, into execution, but kept them, (petitioners) out of possession; they therefore sue for possession and *wasilat*. The plaint is dated the 5th of March.

‘ The defendants, in answer, urge that the plaintiffs being unable to pay the 2 *annas* annually, verbally relinquished their right of possession.

‘ The moonsiff, on the strength of the zillah decree, confirmed by that of this Court, decreed in favor of the plaintiffs; recording, at the same time, that the defendants adduced no proof in support of their allegations.

‘ The principal sudder ameen reversed this decision, because the plaintiffs were dependent *ryuts*, had no *pottah*, and therefore the proprietor was entitled to make fresh settlements with others, if at the close of the year the plaintiffs failed in their engagements.

‘ Both parties acknowledge the decree of this Court dated 25th January 1836, under which the plaintiffs were to pay 2 *annas* per

annum *malgoozaree*. The defendants (now respondents) allege they demanded rents, which the plaintiffs said they could not pay; but before the moonsiff there is no proof of this plea, and the principal sudder ameen has not touched on this point. He has decided the case without reference to the pleas urged by the parties severally, viz. on the part of the plaintiffs their rights under the Sudder decree, and on the part of the defendants the relinquishment of these rights by the plaintiffs themselves. He has thus travelled *out of the record*, and has not disposed of the case on its merits, and pleas as urged by them. Without adverting to the rights of a tenant to such a holding, it is sufficient in this case to start from the date of the Sudder Court's decree, upon which document both parties rely. If under this decree plaintiffs are entitled to possession, it is incumbent on the defendants to shew that their right, *which they acknowledge*, was relinquished in their, defendants' favor, voluntarily; and this is the point at issue, from which the principal sudder ameen has wandered. I admit a special appeal to try whether the principal sudder ameen's judgment, under these circumstances, can be upheld. I would not award any *wasilat*?

Under the above circumstances, we return the case to be tried by the principal sudder ameen on its merits, and on the pleas urged by the parties respectively.

THE 22^D JULY 1848.

PRESENT :

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 532 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Sarun, December 26th, 1845; affirming a decree passed by the Sudder Ameen of that District, February 21st, 1844.

SHEONATH SINGH, APPELLANT, (DEFENDANT,
WITH ANOTHER,)

versus

SHEIKH HADI ALI, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Ameer Ali.

Wukeel of Respondent—Gopal Kishen Raee.

THIS case was admitted to special appeal, on the 30th August 1847, under the following certificate recorded by Mr. Charles Tucker:—

‘ This was an action brought on 24th March 1843 to recover money on two bonds, dated 6th January and 5th November 1809, that is after nearly 34 years ; and the reasoning for getting over the statute of limitations, in the decree of the sudder ameen, which was affirmed by the principal sudder ameen, are utterly unworthy of consideration. I therefore admit a special appeal, deeming the decisions of the lower courts to be contrary to the provisions of Section 14, Regulation 3, 1793.’

The case in amount was within the competency of a sudder ameen, but was referred to and tried, and decided in the first instance by a principal sudder ameen. In such case the appeal ought to have been heard and determined by the judge, and not by another principal sudder ameen.

We therefore cancel the decision in appeal by the principal sudder ameen dated the 26th December 1845 ; and remand the proceedings to the judge, who will proceed to try the case in the presence of the *wukeels* employed by the parties in appeal in the principal sudder ameen’s court.

THE 22D JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 162 OF 1848.

Special Appeal from a decision passed by the 2d Principal Sudder Ameen of Zillah Tirhoot, September 15th, 1845 ; reversing a decree passed by the Moonsiff of the Western Division of Tirhoot, April 28th, 1845.

AZMEREE SINGH AND OTHERS, APPELLANTS, (DEFENDANTS,)

versus

THAKOORNATH SINGH, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Hamid Russool.

Wukeel of Respondent—Ameer Ali.

THIS case was admitted to special appeal, on the 27th April 1847, under the following certificate recorded by Mr. C. Tucker :—

‘ In this case plaintiff and defendants purchased from Brijomohun

Singh, &c., under separate *kubalas*,—the former a 6 *annas*', the latter a 4 *annas*' share of *mouzah* Chuck Jan Mahomed.

'The plaintiff's *kubala* is dated 28th August 1844; the defendants' 30th idem. Both were registered on the same day.

'The plaintiff, on 7th October 1844, brought the present action claiming *huq shuffa*, or right of pre-emption, *quoad* the 4 *annas*' share of the village sold to the defendants.

'The moonsiff dismissed the claim, because the original *kubala* of the plaintiff was not filed; and this was necessary, because defendants stated both *kubalas* bore originally the same dates; and also because the plaintiff did not declare his intention of claiming his privilege on the day the two *kubalas* were registered, when he must have been cognizant of the sale to the defendants.

'The 2d principal sudder ameen reversed the decision of the moonsiff, because it was not incumbent on the plaintiff to file the original *kubala*, having filed a registered copy thereof; and because the sale to the defendants not having become absolute till some days after the registry, the plaintiff was in time when he intimated his intention of claiming his privilege on the sale becoming absolute.

'I admit a special appeal on two grounds:—*first*, that the claim of *huq shuffa* was never intended to extend to cases of this nature, where a proprietor is at one and the same time negotiating with two parties a sale of a portion of his property, and one *kubala* happens to be dated a day or two before the other.

'*Secondly*, that if the claim of *huq shuffa* do extend to such cases, then it was incumbent on the plaintiff to have declared his intention of taking advantage of such his right on the day the deeds were registered, when, ostensibly at least, the sale to defendants was completed.'

We find that the moonsiff in his decision distinctly states, that both parties were present when the two *kubalas* were registered on the 31st August 1844. The plaintiff in his appeal does not dispute this alleged fact; and the principal sudder ameen argues as though he were of the same opinion as the moonsiff on this point.

Under these circumstances, we are of opinion with the moonsiff, that it was incumbent on the plaintiff to have proclaimed his intention of availing himself of his rights as *shuffee* at the time the deeds were registered; for, as far as he was concerned, he had no reason to suppose that the purchase by the defendants was not complete as stated in the *kubala*. This, by his own confession, he heard some days after the registry. We therefore annul the decision of the principal sudder ameen, and affirm that of the moonsiff, with costs in all courts payable by the respondent.

THE 24TH JULY 1848.

PRESENT :

R. H. RATTRAY and
ABER. DICK, Esqrs.,

JUDGES.

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 189 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, Syud Munowur Ali Khan, February 26th, 1847.

PURTAB NURAIN AND MUSST. MEERINJEE, HEIRS OF
LALLA SHEODEAL SINGH, APPELLANTS, (PLAINTIFFS,)

versus

SHEO SUHAE SINGH *alias* SUNAO LAL AND KALEE
SUHAE *alias* KALEE PURSHAD, RESPONDENTS, (DE-
FENDANTS.)

Wukeel of Appellants—J. G. Waller.

Wukeel of Respondents—E. Colebrooke.

THIS suit was instituted by appellants, on the 28th July 1846, to obtain redemption of a mortgage under a deed of conditional sale (*bybil-wuffa*), bearing date the 1st April 1828, of half the village of Tindooa, in *pergunnah* Saseram, with mesne profits from 1236 to 1257 *Fuslee*. Total estimate for stamp Company's rupees 9,112, 14 annas, 4 pie, and 4 cowries.

On the 1st April 1828, Lalla Sheodeal Singh, appellants' ancestor, borrowed 2,000 rupees from Lalla Ramnurnain Singh, ancestor of respondents, executing on the same date the mortgage deed upon which the suit is grounded, which pledged, with possession, half the estate of Tindooa for 9 years; the terms involving a conditional sale in failure of payment of the debt with interest.

On the 30th January 1846 appellants received possession, by what means does not clearly appear; but their occupancy was maintained by the magistrate under Act 4 of 1840; and they have now sued to cancel the mortgage, and to have an account rendered by the mortgagees, which, according to their own shewing, should exhibit the balance claimed by them.

Respondents deny the statement of appellants, but decline rendering any account themselves; having applied to foreclose the mortgage, under the terms of their agreement, by issue of the notice prescribed by Regulation 17 of 1806.

The principal sudder ameen rejected the claim of appellants, upheld the plea of respondents, and dismissed the suit: hence this appeal.

We find that this is a claim on the part of the heirs of a mortgager for adjustment of accounts with the mortgagee, and redemption of the mortgage. It appears that the mortgagee issued summary process of foreclosure, but did not follow this up by the institution of a regular suit. In order to succeed, the appellants must prove that the whole sum lent was repaid with interest to the mortgagee from the usufruct of the estate, before the close of the year allowed by law as equity of redemption. To this point no evidence has been heard or called for, and the claim has been dismissed without any due investigation. We therefore reverse the decision; and direct that the proceedings be returned, and that the principal sudder ameen call for evidence on the point above noticed, and dispose of the case on its merits.

The usual orders will issue as regards costs, &c.

THE 24TH JULY 1848.

PRESENT:

R. H. RATTRAY and
ABER. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 55 of 1848.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, Mohummud Ibrahim Khan, June 26th, 1845.

GUNGA PURSHAD AND GOVIND PURSHAD, APPELLANTS,
(PLAINTIFFS,)

versus

BUJRUNG PURSHAD FOR SELF AND RAGHOO PURSHAD,
HIS BROTHER; GOBURDHUN PURSHAD FOR SELF AND
ISHREE PURSHAD AND BISHUN PURSHAD, HIS BROTHERS;
AND RAJAH BHOOP SINGH, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellants—J. G. Waller.

Wukeels of Respondents—Bhoop Singh and Hamid Russool.

THIS suit was instituted by appellants, on the 12th July 1844, to recover from respondents the sum of Company's rupees 36,959-7-5, mesne profits on a third share of half the *talook* of Raghopore, from 1232 to 1249 *Fuslee*.

The respondents, present and represented, with the exception of Bhoop Singh, are the sons of Benee Singh and Byjnath Singh, deceased, uncles of appellants; the parties to the suit (Bhoop

excepted) being first cousins, descendants from the same common grandfather.

In a suit (decided on the 18th of April 1842,) Gunga Purshad and Govind Purshad, paupers, plaintiffs, *versus* Benee Singh and Byjnath Singh (and their heirs or demise) and Rajah Bhoop Singh, for a third share of a fourth of *mouzah* Bheempore, and a third share of half of the *talook* of Raghopore, and to stay the sale of the same about to take place at the instance of Bhoop Singh, under a decree held by him against the other defendants, it was decided that Benee Singh, the uncle and guardian of the plaintiffs, (present appellants) had exceeded his competency in jeopardizing the estate by the engagement entered into with Bhoop Singh, who held his decree against the proprietors for an 'advance' about to be satisfied by the sale, which the action was brought to prevent. Possession of the share claimed was adjudged to appellants, who now sue for the mesne profits during the period noted.

The claim has been dismissed on two grounds:—*first*, that with the suit for the lands, a pauper suit was also instituted for mesne profits from 1224 to 1244 *Fuslee*, estimated at *Sicca* rupees 61,711, 14-0-17, which suit, on the passing of the decree for the lands, was not deemed cognizable, (appellants being no longer entitled to sue *in forma pauperis*) and was accordingly struck off the file. That in the present suit a less sum is sued for, with an avowal from appellants of their intention to bring a separate action for the remainder; and that no judgment in favor of such a claim, so preferred, can issue. *Secondly*, that on the 4th June 1834, a decree was passed in favor of Bhoop Singh against Benee Singh and Byjnath Singh, personally, and as guardians of appellants, for the mesne profits now in part sued for; and that this, the same matter, is not now a second time cognizable by the courts, and the claim must be dismissed.

On the first point appellants plead that they sue for what is due by Bhoop Singh; their uncles being made defendants on the score of having illegally pledged the lands to him: the separate claim is for the antecedent period between 1224 and 1231 *Fuslee*, for which they (the uncles) only are liable; and which period, without any breach of the law, be made the ground of a separate action. On the second point they plead, that the judgment of 1834, in so far as it affects the present matter before the Court, is a manifest nullity,—the question then determined having been based on an arrangement judicially pronounced to be illegal.

We observe, that this claim is for mesue proceeds of an estate, preferred against the late guardians of appellants and their farmer, Bhoop Singh. It seems that appellants obtained a decree for the estate; and that, on the ground of that award, they now seek to obtain the mesne proceeds for the period of dispossession. Such a suit will not lie. Against the farmer there can be no claim,

because in fact he was not in possession, having underlet the farm back to the guardians ; but whether he was, or was not in possession, appellants have no right to the proceeds : the arrangement between the guardians and the farmer held till it was set aside by the Court, and possession given to appellants ; and up to that time the farmer was responsible to the guardians, who acted in the name and for the benefit of the then minors (appellants) who may now claim from them a settlement of accounts, but no action for mesne profits can lie against them. Appellants must therefore be nonsuited, as not competent to bring the suit in the mode they have adopted. Nevertheless the guardians are accountable to them for the proceeds of their share ; and if on rendering their accounts as guardians, any thing be wanting, or unexplained in regard to these proceeds, an action will lie against them for adjustment.

THE 25TH JULY 1848.

PRESENT :

R. H. RATTRAY and
ABER. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 540 OF 1847.

Regular Appeal from a decree passed by the Officiating Principal Sudder Ameen of Purneah, Mr. W. Noney, September 28th, 1847.

SYUD INAIT REZA *ahas* MEERUN, APPELLANT,
(DEFENDANT,)

versus

GEORGE WALKER, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—J. G. Waller and Ameer Ali.

Wukeels of Respondent—Pursun Komar Tagore and A. Imlach.

THIS suit was instituted by respondent, on the 17th March 1847, to recover from appellant the sum of Company's rupees 46,861-5, principal and interest, in virtue of a bond bearing date the 31st December 1844.

The following is the judgment appealed from:—‘ In this case the plaintiff sues to recover Company's rupees 46,861-5, principal and interest, due on a bond of rupees 37,025. Defendant admits the bond ; and alleges, that at the time it was executed he received 3,000 rupees, and afterwards 1,500 rupees, aggregating 4,500 rupees. As defendant acknowledges

having executed the bond, and a power of attorney, and alleges that he only received 4,500 rupees, this plea is properly considered futile :—*First*, the bond is fully established by witnesses, and the delivery of rupees 37,025. *Secondly*, the power of attorney being executed six months after date of the bond, wherein the bond is also acknowledged. *Thirdly*, the defendant's witnesses depose, that only 1,000 rupees was paid at the time the bond was executed, and afterwards a further sum for court and defendant's private expenses, aggregating in all 4,500 rupees : the same is stated in the petition given in court ; but defendant states in his answer that he received 3,000 rupees, and that the same was counted over and over to complete 37,000, therefore the evidence of defendant's witnesses is conflicting when compared with the answer. *Fourthly*, Sheik Pauchoo, witness for defendant, was in plaintiff's service at the time the bond was executed, and afterwards discharged, deposes that 1,000 rupees was paid to defendant, and he entered it in plaintiff's book : therefore plaintiff's book was called for, as directed in a *roobukaree* dated 4th September 1846 ; but instead of producing it,* stated in a petition that no book was kept, when a loan was made a bond was taken. *Fifthly*, as stated in defendant's rejoinder, Mr. Palmer was called upon for a *kyfeet*, who stated he heard from defendant that he did not receive the full amount of the bond ; but he did not ask plaintiff of it, neither plaintiff mentioned any thing*. *Sixthly*, it is here to be considered, that if defendant did not receive the full amount of the bond, he would have taken measures to have it returned. The whole of the pleas set forth by defendant are inadmissible. Ordered :—this case be decreed with costs.'

The bond, bearing date the 31st December 1844, is for 37,025 rupees ; and a moiety of appellant's share of the family estate of Soorjapore, is pledged for the payment.

The power of attorney mentioned in the decision above given, opens with a short account of appellant's family ; and proceeds to explain how disputes amongst its present members led to the interference of the courts. The subsequent engagement of respondent's services, and the terms on which they were obtained or promised, are then set forth in what follows :—

'In consideration of these circumstances, and being in the full enjoyment of health and reason, I voluntarily engage Mr. George Walker, resident and proprietor of an indigo factory at Gujra, in *pergunnah* Huwelee Purneah, as my patron, attorney, and sole manager of all my affairs, whether important or trifling, on these conditions, viz. that he (Mr. George Walker), shall institute a regular suit in the zillah court and, (if necessary) carry the same

* So in the original.

up to the Sudder Court and Privy Council, with the view to procure a favorable result in my behalf; that he shall pay all costs and expenses from his own funds; that he shall appoint any person whom he may think fit to act as *wukeel*, or *mokhtar*, in the zillah and Sudder Courts, and the Privy Council; that he shall sign my name with his own pen upon the *mokhtarnamehs* and *wukalut-namehs*, and whatever he may do on my behalf shall be considered as done by myself; that, in order to carry on my summary suit, and for my own personal expenditure, the sum (Company's rupees 37,025) which I borrowed from him on a bond dated the 31st December 1844, duly registered on the 3d January 1845, and which I have appropriated to my own private use and to the prosecution of the said case, as well as any money which I may hereafter borrow from him for the prosecution of this suit, or for my own personal expenditure, on bonds bearing my seal and signature, I hereby agree to pay the whole of the same, principal and interest, in conformity with the terms of such bonds; that I, or my heirs, will not make any objection or excuse to the payment of the same; that the said gentleman shall be considered as my attorney and sole manager till this case be finally decided, without reference to my living or dying, either in the zillah or Sudder Court, or by the Privy Council; that, before such final decision, I, or my heirs, shall not be at liberty to discharge him from the attorneyship and management, or to appoint any other person in lieu of him, (the said Mr. Walker); that should I ever execute a power of attorney in favor of any other person, it shall become null and void on the production of this deed in any court; that should I enter into compromise with my opponents without the advice or permission of the said Mr. Walker, such compromise shall be deemed legal and invalid; that his remuneration as *mokhtar* is fixed at 50,000 Company's rupees, which I pledge myself to pay without any demur on gaining my cause; that I, or my heirs, will not plead any objection to the payment of the same; that in the event of my gaining the cause, whatever right and title to the disputed property, real or personal, may arise to me, either through the court or by compromise, it shall be held and possessed by Mr. Walker, with the produce thereof, after paying the Government revenue, until I shall have paid all dues upon the bonds above alluded to, together with the amount of remuneration claimable by the said gentleman; that should I obtain a decree in the zillah court, and in consequence of no appeal being preferred against it in the Sudder Court, or to the Privy Council, it become final, still, nevertheless, I shall pay his fee in full; but if, unfortunately, I lose my cause, I shall then pay him only the amount, principal and interest, whatever it may be, due under the bonds. I have accordingly executed this power

of attorney, for reference in case of need, this 11th day of June 1845, corresponding with the 30th day of *Jeyt* 1252 B. S.'

The above was registered on the 16th June 1845, corresponding with the 3d of *Assar* 1252 B.

The appeal came before Mr. Rattray in the first instance ; and by him, on the 16th. May last, was made over for hearing and disposal by a full Court, on the grounds set forth in the following minute :—

'The evidence in this case, with exception to the two deeds above noted, is altogether supplied by the living witnesses to the transaction summoned by the parties respectively ; and, as usual, each tells a story calculated to uphold the pleas advanced by his principal.

'The acting principal sudder ameen has given some good reasons, judicially speaking, for the judgment he has recorded : and of the legal liability of the defendant under the documents, apart from other evidence, there can scarcely be a question. But we sit as a Court of equity as well as law ; and, in cases like the present, our practice is to sift the evidence and the pleas of parties before us to the utmost permitted by the circumstances connected with the matter at issue.

'In the present instance, I deem it most singular that an indigo planter, in a remote part of the country, should have 37,000 rupees lying unemployed in his strong box, ready at a day's notice, to lend on such a speculation as this transaction exhibits. I also consider it as unusual for private individuals to possess iron chests of a description calculated to contain above twenty *torahs* of rupees. The *torah* is commonly understood to signify a bag of a thousand ; and forty-five *torahs* are stated to have been produced on this occasion, containing 37,000 rupees from two iron chests in one of the rooms of the plaintiff's *bungalow*. Even the witnesses, who were chance comers at the time of the proceeding,—one (Bhyaram) having visited the *bungalow*, 'to settle some accounts,' and another (Dhoondhae Mundul) 'to furnish the defendant with *ghee*,'—even these—who were present in the room in which the business was being transacted, and swear to its nature *as present*,—even these know all about the iron chests in the other room, and depose accordingly.

'It is impossible to give a fair exposition of the evidence in abstract. It must be read and compared, and carefully weighed and considered. The impression on my own mind is, that the plaintiff is not entitled to the judgment he has gained from the acting principal sudder ameen ; and I bring the case before a full Court accordingly.

'The two iron chests above alluded to measured,—one 24 inches in length, 14 inches in breadth, and 13½ inches in depth ; the other 22½ in length, 13½ in breadth, and 13 in depth.'

The Court's decision will supply the rest.

The bond for the money claimed is produced and proved, as well as admitted by the defendant, who pleads that the amount mentioned in the bond (37,025 rupees) was never paid to him, and that he received 4,500 only. The bond was executed in December 1844; and in the June following a power of attorney, which is also produced, and in which the bond is distinctly alluded to, with an expressed acknowledgment of its amount having been received in full. Notwithstanding these admissions, the evidence to the payment appeared suspicious; and the transaction altogether had such an air of improbability, that the Court was induced to direct the zillah judge to make further enquiry into the circumstances of the case, with the view more particularly of ascertaining whether the money was actually in the lender's possession at the time of the asserted payment. The reply of the judge, so far from establishing this fact, appears to us to shew that the plaintiff could not furnish the proof required, that is that he had 37,000 rupees in his possession when he would persuade the Court he lent and paid that sum to the defendant. On the contrary, his evidence as regards the payment of such an amount from two iron chests, is met in the most decisive manner by the measurement of those chests, which are evidently not capable of containing the money, which too is represented as having been in bags. As we are by no means satisfied that the sum claimed (37,025 rupees) was paid, we decree only for that acknowledged to have been received, 4,500; which we adjudge with interest and proportional costs, modifying the decision of the acting principal sudder ameen accordingly.

THE 26TH JULY 1848.

PRESENT:

R. H. RATTRAY, Esq.

JUDGE.

CASE No. 62 OF 1848.

Regular Appeal from a decree passed by the Additional Judge of Tirhoot, John French, Esq., July 30th, 1847.

DHUNNEE RAM MUHTOON, AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

MUSST. MOHUN KOWUR, DAUGHTER OF RAM SHEWUK,
FOR SELF AND AS MOTHER OF ISHREE DUTT, HER MINOR
SON, RESPONDENTS, (PLAINTIFFS.)

*Wukeels of Appellants—Gopal Kishen, Aftabooddeen and
Uzmutoollah.*

Wukeel of Respondents—None—nor present in person.

THIS suit was instituted by respondent, on the 24th December 1845, to obtain possession of certain lands in the village of Jāwuj,

with record of proprietary right in the collector's books ; and to cancel a *kubaleh*, or deed of sale, executed by Musst. Dolaroo Kowur, widow of Ram Shewuk, in favor of appellants. Estimate (3 *jummas*) Company's rupees 120.

The substance of the plaint is, that Ram Shewuk and Futteh Chund, the sons of Khurrug Das, held a 12 *annas*' share of the village of Jâwuj in inheritance from their father ; that, on their death, their widows obtained a decree against their mother-in-law for six *annas*' each ; that that decree was affirmed so far as a life interest extended, but any alienation of the lands was prohibited as illegal ; that Musst. Dolaroo, the widow of Ram Shewuk, having sold a 2 *annas*' portion of the share thus conditionally adjudged to her, the present action is brought to cancel the illegal transfer.

Musst. Dolaroo did not appear. Appellants (the purchasers from her) answer, that respondent had already sued for possession of the 6 *annas*' share ; and that consequently this claim for 2 *annas* of the same 6 *annas*, is not cognizable by the courts ; and that the 2 *annas*' portion purchased by them, was sold to discharge debts due by Ram Shewuk, the father of respondent, and to defray the expenses of her marriage, and therefore no illegality attended the transfer.

No evidence was adduced by appellants in support of their plea, while that of respondent clearly established that her father died in 1221 *Fuslee* free from debt ; that her marriage, which took place in 1231 *Fuslee*, was paid for from the proceeds of her mother's 6 *annas*' portion of the estate ; and that the money obtained by the sale, now sought to be cancelled, was disbursed to meet the expenses attending the wedding of Musst. Dolaroo's brother.

Upon the above evidence, the sale of the two *annas*' share was ordered to be cancelled ; but Musst. Dolaroo having a right of occupancy during her life under the decree above mentioned, present possession was refused. Costs made payable by appellants.

Concurring with the additional judge in his view of the case, and the judgment appealed from, the decision is hereby affirmed, with all additional costs chargeable to appellants.

THE 26TH JULY 1848.

PRESENT:

ABER. DICK, Esq.,

JUDGE.

CASE No. 11 of 1844.

*Regular Appeal from a decision passed by the First Principal
Sudder Ameen of Zillah Hooghly, Mynodeen Sufdur.*

ISHWUR CHUNDUR RAE AND PURTAB CHUNDUR
RAE, APPELLANTS, (PLAINTIFFS,)

versus

SREENATH MOOKERJEE, THEN RAM JYE PAUL AND
OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Abas Ali.

Wukeel of Respondents—Pursun Komar Tagore.

SUIT and appeal laid at rupees 5,286-9-6, for recovery of possession on 146 *biggahs*, 17 *cottahs* of land held as rent-free, situated in *mouzahs* Raj Haut, &c., *pergunnah* Hooshalpoor.

The claim is founded on the allegation that the plaintiffs were in possession of the land in question as rent-free in 1231 B. Æ., when they were ousted by the then zemindar, or rather *putneedar*, Ram Nurain, and have been kept out of possession by his successors in the *putnee*, the other defendants.

Ram Nurain never appeared, as his interest in the estate had been sold. The respondent denied that the land was rent-free, and declared he had not dispossessed appellants. The principal sudder ameen, on the grounds set forth in a proceeding of a deputy collector (the land in question with others, held as rent-free under one *taeedad*, or statement, having been resumed by Government) decided that plaintiffs had not held possession since 1204 B. Æ., when their and their co-sharers' right and title to the estate was sold; and, consequently, that their claim was barred by lapse of time: besides which the invalidity of the rent-free tenure had been declared by the resumption courts. He therefore dismissed the suit.

In appeal it was successfully shewn by appellants' pleader, that the former proprietor of the estate, Ram Nurain, had admitted his ousting of appellants in 1231 B. Æ.; and that, therefore, appellants had a right to usufruct from the proprietors from that period, and to restoration to possession, whatever might be the decision of the resumption officers as to the validity of the rent-free tenure.

This was met by the respondents' pleader, who contended that the former proprietor was authorized under Section 10, Regulation 19, 1793, to oust appellants, unless their grant was dated anterior to 1st December 1790, which appellants have not shewn.

The only points for decision in this case are :—*first*, the dispossession or not of appellants by the proprietor in 1231 B. Æ. from the lands in suit, held on an alleged rent-free tenure ; *second*, the legality of such dispossession ; *third*, the liability, and to what extent, of the several defendants, in particular the respondent.

There can be no doubt on the first point, after the unqualified admission of the former proprietor, Ram Nurain. On the second point, the appellants were bound to prove that they held possession on a grant anterior to the 1st December 1790, after silent acquiescence during so long a period in the ousting. This they have not attempted ; consequently their claim for re-possession and usufruct falls to the ground.

Appeal dismissed with full costs.

THE 26TH JULY 1848.

PRESENT :

ABER. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 276 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, May 18th, 1846.

JUSEEM-O-ZUMAN CHOWDHREE, APPELLANT,
(PLAINTIFF,)

versus

GOURNATH SHAH AND ANOTHER, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondents.—None.

CLAIM for 6 annas' and upwards share of *Turf Rajdhundee*, and reversal of a sale under Regulation 7, 1825 : suit laid at rupees 6,500.

This was a claim to reverse a sale in execution of a decree. The collector was at first made one of the defendants ; but the plaintiff afterwards begged that his name might be struck out from among

the defendants, with reference to Section 38, Regulation 11, 1822, alleging that he had included him by error.

On the 18th May 1846, the principal sudder ameen dismissed the suit. The chief ground of dismissal being that the objection now raised to the sale, viz. that the notice was not issued for 30 days as required by the Regulation (7, 1825) was not urged summarily in the petition against the confirmation of the sale; and that not having been there urged, it could not be heard in a regular suit,—referring on this head to Section 25, Regulation 11, 1822.

From this decision the plaintiff appeals, urging that the Regulation (11, 1822, Section 25) does not apply to sales held in execution of decrees.

The ground of the decision of the principal sudder ameen is untenable. There is no law declaring that in sales held in execution of decrees, objections not urged summarily to the court which ordered the sale, shall not be heard in a regular suit to reverse the sale. The plaintiff may urge his objections in a suit, notwithstanding such omission in his summary petition.

The decision of the principal sudder ameen therefore cannot stand. It further appears from the papers that the defect in the notice actually took place, as stated by the appellant; and this defect is by law fatal to the sale. Ordered therefore that the sale be reversed, and possession be awarded to the plaintiff; the plaintiff, however, will not receive mesne proceeds from the purchaser. The purchaser will, in the same manner, receive back his purchase money without interest: costs to be paid by the defendant.

THE 27TH JULY 1848.

PRESENT:

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 150 OF 1848.

IN the matter of the petition of Musst. Raoofun and Musst. Bibi Bundhooee, and others, filed in this Court on the 15th May 1848, praying for the admission of a special appeal from the decision of John French, Esq. additional judge of zillah Tirhoot, under date the 16th February 1848; reversing that of Niamut Ali Khan, first principal sudder ameen of the said zillah, under date the 20th June 1845, in the case of Musst. Raoofun and Musst. Bibi Bundhooee, and others, plaintiffs, *versus* Sheikh Moazum Ali and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The suit was instituted by the petitioners to recover from the defendants Company's rupees 1,153-4, being the balance, with interest, of an advance made on the lease of the village of Puharpore-Chuprah-Budoo, *pergunnah* Sureesa, bearing date the 17th *Kartik* 1231 *Fuslee*.

Musst. Raj Bibi, deceased, had given a lease of the whole village to the ancestors of the plaintiffs (petitioners) on an advance by the latter of *Sicca* rupees 762, at an annual rent of 38 rupees, from 1231 to 1239 F.; the arrangement to hold good till the advance should be satisfied. Plaintiffs held possession till 1245 F., when the village was attached by Government, and a settlement made with the defendants, when plaintiffs were turned out and dispossessed. The sum of 517 rupees, after deducting payments acknowledged to have been made and received, is declared to be still due; and for this sum with interest the present suit was instituted.

The claim has been rejected under the statute of limitation, with reference to the date of the lease or deed of advance. The particulars of the case, with a detailed exposition of the grounds of the judgment, will be found at page 35 of the Tirhoot decisions of February last.

In the case No. 24 of 1845, decided by the Sudder Court on the 17th March 1846, the circumstances of which were precisely those of that now before it, it was held that such a decision was contrary to the practice of the courts in such cases; and that a borrower should be held responsible for a debt contracted on the security of land, till it were proved that such debt had been satisfied from the produce of the land, or by other means.

As in that case, so in this, the law of limitation does not apply: the deed or *pottah* stipulated for possession till the advance should be satisfied, and under that deed possession was held, unopposed, till 1245 F. In 1251 F., this action was brought, which has been dismissed as out of time.

The decision appealed from is hereby cancelled; and the case will be returned to be restored to the file, and tried *de novo* upon its merits.

The usual order as regards stamps, &c.

THE 27TH JULY 1848.

PRESENT :

ABER. DICK, Esq.,

JUDGE.

CASE No. 68 OF 1847.

Regular Appeal from a decision passed by the Judge of Zillah East Burdwan, Arthur Smelt, Esq., November 24th, 1846.

GUDHADHUR PURSHAD TEWAREE, APPELLANT,
(PLAINTIFF,)

versus

MOOFTEE LOOTF HOSEIN KHAN, LATE PRINCIPAL
SUDDER AMEEN OF THE ZILLAH, RESPONDENT, (DEFENDANT.)

Wukeel of Appellant—Taruk Chundur Raee.

Wukeel of Respondent—Bunsee Buddun Mitr.

SUIT and appeal laid at Company's rupees 700, amount of debt.

The particulars of the case, the judgment of the court, and the reasons for it are set forth in the following decision of the zillah judge.

‘ This suit was preferred by Gudhadhur Tewaree, who states in his plaint that the defendant, through his servant, borrowed from him 700 rupees, which he sent by his own servant to the then principal sudder ameen on the 2^d Poos 1252, B. S. The defendant states that he never borrowed any money from the plaintiff; that he does not know him, and that it is quite unusual to borrow from a man of whom he knows nothing; and that he, the defendant, had decided two cases against the plaintiff, who entertains enmity towards him; and who actually lodged a complaint against him, the defendant, through some of his creatures, which was dismissed by the then judge of this district. The plaintiff, in his answer to the defendant, states that the money was advanced to the principal sudder ameen to defray the medical charges incurred on account of his wife's illness, who had come to Burdwan for her recovery.

‘ The plaintiff's witnesses state certainly that the money was sent to the defendant's house, who sent back by plaintiff's servant a verbal message with his *salaam*, and that he had received the amount; whilst those of the defendant fully prove that, at the time of this alleged debt being contracted, the defendant's wife

was in her own house, 10 or 12 *cos*s distant, and had never come at all, at the time stated, to Burdwan. On a careful consideration of the circumstances of this case, it seems to be most extraordinary that the defendant should send to borrow money from a person of whom he knew nothing, without giving his messenger some written paper to shew that the person who went to borrow it was really and truly deputed by him for this purpose; that the plaintiff should, under such circumstances, send the money asked for; and even after delivery of the money not ask for any receipt, any bond, or any acknowledgment of the debt. The only entry of the debt is in the plaintiff's *jumma-khurch* book. This entry is made by the plaintiff, and is not signed by the defendant, nor even by the person who went for the money. I consider therefore that the plaintiff has not proved his case, and dismiss the plaint; and all costs to be defrayed by the plaintiff.

In appeal nothing new was advanced: the appellant merely contended that as his witnesses had deposed to the loan, he was entitled to a decree, although he had no documentary evidence to produce, under Section 15, Regulation 3, 1793.

- For the respondent, his pleader urged the utter improbability of the alleged transaction: for his client knew nothing personally of the appellant, who himself could not assert that he had ever been inside respondent's house, or respondent inside his house. Moreover respondent had, on the very day of the alleged loan, decided a case against appellant; and it so happened that he had decided against appellant almost every case in which appellant had appeared as a party before him.

The improbabilities are all against the truth of appellant's statement and claim, and even the testimony which he has brought to prove his claim is very defective. The only respectable witness in point of calling, and who testifies to the entry in the book of expenses, has evidently been guilty of equivocation; besides which his evidence goes to prove nothing more than that he was ordered to send 700 Company's rupees to respondent, whether the money was actually paid to respondent or not, he knows not. The decision of the lower court is affirmed, with full costs against appellant.

THE 29TH JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 352 of 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, July 22d, 1845.

RAJAH SUTCHURN GHOSAUL, APPELLANT, (DEFENDANT,)

versus

GOURKISHORE BISWAS, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Taroke Chundur Raee.

Wukeel of Respondent—Kishen Kishore Ghose.

THE respondent claims a 4 *annas*' share in a *talook* named Zim-meh Beejaye and Sreemunt Biswas, situate in the 5 *annas*, 15 *gundahs*' share of *pergunnah* Suleemabad, the zemindaree of Rajah Kalee Sunkur Ghosaul, the appellant's father (deceased.)

The zemindar sold the *talook* in execution of a decree for rent, under the provisions of Regulation 7 of 1799, on the 19th *Magh* 1249. The deposit money not being paid, it was again sold on the 21st idem, and bought by plaintiff's sharers, in the name of Kumla Kunt Bose. The commissioner of revenue reversed this sale on the petition of plaintiff and another; and the land was eventually bought by Sutchurn Ghosaul, the defendant, on the 31st July 1834, who has kept plaintiff out under his purchase.

The plaintiff sues to reverse the sale, as the collectors were not empowered to sell land for balances till Act No. 8 of 1835 was passed on the 8th June of that year; and the sale of his lands was made one year previous to that enactment. He quotes the case of Muddun Kishore Indoo, decided by this Court on the 9th July 1841, in support of his plaint, and claims 254 rupees per annum *meane profits* from date of sale.

The appellant, in answer, pleads that no action having been brought to reverse the summary decree in his favor, a suit for the reversal of the sale is not admissible; and adds the sale was not made under Act 8 of 1835, but under the orders of the judge.

The principal sudder ameen, with reference to the case of Muddun Kishore Indoo and the decision of the Sudder Dewanny Adawlut of July 1841 thereon, reversed the sale, and awarded possession with *wasilat* to the plaintiff up to date of regaining possession.

Besides the case above quoted, this Court's judgment in the case of Hurmohun Biswas, a co-sharer with the plaintiff, (*vide* page 129 of this Court's decisions for March last, present Mr. Jackson) forms a precedent for the disposal of the suit now before us. On perusal of the judge's order, on which the defendant relies, we find that that officer made over sundry sale cases to the collector on the receipt of Regulation 7 of 1832 (this being one of them), under the impression that he had no longer himself authority to conduct sales. The Regulation (*vide* Section 16) refers to *putnee talooks* and similar tenures, not to sales in satisfaction of summary awards by the civil court; so that if the collector did act under the order of the judge, the sale cannot be upheld. The Court confirm the decision of the principal sudder ameen, with costs chargeable to the appellant.

THE 29TH JULY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 4 OF 1844.

Special Appeal from a decision passed by the Judge of West Burdwan, May 29th, 1843; reversing a decree passed by the Principal Sudder Ameen of that district, December 20th, 1840.

NEHAL CHUNDUR BANERJEE AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

BIRMANUND GHOSE AND OODHAYE CHUNDUR CHUCKERBUTTEE, RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellants—Neelmunee Banerjee.

Wukeel of Respondents—Ramapurshad Race.

A SPECIAL appeal was admitted on the 19th December 1843, on the grounds set forth in the certificate of that date.

The rights of Birmanund Ghose, *putneedar* of lot Bunsee, *pergunnah* Bishenpore, were sold in 1245 by the Rajah of Burdwan under Regulation 8 of 1819, and bought by Oodhaye Chundur Chatterjee, who again sold privately to Nowruttun Das on the 29th *Bysakh* 1251. Nowruttun had his name (as proprietor) registered in the Rajah of Burdwan's *serishteh*, and sold, as it is alleged, to Gopal Das in *Poose* of the same year.

Manick Ram Banerjee, a former proprietor of the lot, sued Madhob Singh and Sohun Singh for possession of 125 *biggahs* in *mehal* Beyrah, situate in *mouzah* Brahmugaon, one of the villages in lot Bunsee. The defendant, Madhob, claimed the land as *ghatwalee*. The register of the court, Mr. James Shaw, gave a decree for *possession of the lands* to the plaintiff. This decree was upheld by the judge (Mr. Nisbet) of the Jungle Mehals on the 20th July 1832, or 6th *Srabun* 1239.

Nundkomar's rights had been sold for balances under Regulation 8 of 1819, and were bought by the Rajah himself in 1238, who, as above stated, gave a *putnee* to Birmanund Ghose. The Rajah, after his purchase in 1238, applied to the judge for execution of the decree of the 20th July 1832, who refused to give him possession, as he was not a party to the suit, but told him to take possession. Should the *ghatwals* object, immediately the order of July 20th should be enforced, and decree passed in his favor.

Birmanund having purchased the lot from the Rajah, went to take possession; the *ghatwals* did object, and he then sued, (No. 3502) in the moonsiff's court for possession on 24th February 1834; got an *exparte* decree (21st July 1834) accordingly, and possession in *Chyite* 1241, or April 1835. He made settlements at rupees 205, 6 *annas*, 10 *pie* per annum with the *ryuts* on the 125 *biggahs*; and when the crops on the lands were ripe, the defendants, that is Nehal Chundur Banerjee, with Beharee Singh and others, the heirs of Madhob and Sohun Singh, with their followers, cut and carried them off, and ousted his *ryuts* of 96 *biggahs*, 14 *cottahs*, the *jumma* of which is 164 rupees, 9 *annas*: this was in 1241 B. S., or 1836 A. D. In consequence Birmanund brought another action on 12th December 1837, praying that the possession of his *ryuts* might be upheld, and also for 1,045 rupees, 4 *annas*, with interest to date of realization, which during the years 1240 to 1244 he was unable to collect, in consequence of the acts of the defendants.

The principal sudder ameen, on the 30th April 1839, nonsuited the plaintiff, on the ground that the several defendants should have been sued severally, holding as they did their lands under various tenures and rights,

The judge, Mr. Gouldsbury, remanded the case on the 26th December 1839, as the plaintiffs, *talookdar's* right had repeatedly been decreed to him and to his predecessor, he therefore could not be nonsuited; and directed that the principal sudder ameen should dispose of it on its merits.

The same officer, Doorga Nurain Raee, on the 23d December 1840, disposed of the returned case. The 125 *biggahs*, he observed, were the subject of the suit between Nund Komar, the former *putnee talookdar*, and Madhob Singh and Sohun Singh, the

ghatwals of Katool, when the land was decreed to be *mal*, belonging to the plaintiff, and not attached to the *ghatwallee* tenures: this order was confirmed in appeal. The plaintiff, Birmanund, sued on the strength of these two decisions, and obtained a decree in the moonsiff's court; but the decision in his favor did not by any means provide that he (the plaintiff) should *oust the old ryuts*, and give new *pottahs* to others on enhanced rents. The defendants put in some Regulation 5 of 1812—*fysulahs* and *pottahs*, (signed by one Jewun Lal, a *surburakur* on part of Chytun Singh) to prove their long possession of separate parcels of land: this is also shewn by the institution of several suits by the party claiming *in loco* Birmanund, *i. e.*, Oodhaye Chundur Chatterjee. For this, and other reasons, he dismissed the plaint, and permitted the claimant to assess the *ryuts*, should he desire to do so, by a regular suit brought against them for that purpose.

J. W. Templer, the judge, to whom the case next came in appeal, records on the 29th May 1843, as the appellant had obtained decrees for the land and been put in possession of it (within defined boundaries) according to decree of court, as proved by the evidence of witnesses, and made settlements with *ryuts*, and as it was proved the defendants had cut the crops on the 96 *biggahs*, carried it off, and ousted plaintiff and his *ryuts*, and the respondents did not deny their holding the lands, *even now*, in their possession, the judge rejected so much of the plaint as claimed possession to be given to the appellants' *ryuts*, alleged to have been ousted, declared his *talookdaree* rights, but awarded 100 rupees per annum damages payable by the respondents from 1242 to 1244, with interest to the original plaintiff, Birmanund. The claim to *malgoozaree* for the years 1240 and 1241, he considered could not be recovered under the present action. From 1245 he awarded damages at the same rate to the claimant, Oodhaye Chundur Chuckerbuttee, and decreed the appeal, reversing the principal sudder ameen's decision.

The only party representing the plaintiffs' case, now in Court, is Gopal Das Mohunt, who presents the deed of sale from Nowruttun to himself, and also one from Oodhaye Churn Chatterjee to Nowruttun.

No one has appeared to impugn the integrity of these deeds, though the Court took the precaution to issue notice for the attendance of parties objecting to them, as Gopal failed in his endeavour to cause the attendance of Nowruttun Das.

It appears from the judge's decision, that the respondent was put in possession of the lands in question under decrees of court. It is further proved that the appellants cut and carried off the crops on the 96 *biggahs*; and turned out the *ryuts*, with whom the respondent had made settlements. The point at issue now before

the Court, under the certificate of admission, is, whether a separate suit should have been instituted against each of the 62 persons who have been made defendants in the case, several of whom have set up *lakhiraj* and other claims to portions of the land included in the plaint. As previous decrees of Court establish these identical lands to be *mal* lands, the property of the respondent, of which he was, by the act of the appellants, ousted, after having been duly put in possession in execution of decree, we are of opinion that one suit will lie against all the appellants; and therefore dismiss the appeal with costs.

THE 31st JULY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

CASE No. 168 OF 1848.

IN the matter of the petition of Ishan Chundur Das, filed in this Court on the 25th May 1848, praying for the admission of a special appeal from the decision of the 2d additional principal sudder ameen of zillah Chittagong, under date the 22d February 1848; reversing that of the moonsiff of Zoorawurgunge in the said zillah, under date the 23d December 1848, in the case of Joogul Kishore and others, plaintiffs, *versus* Dagon Ram and others, defendants.

The moonsiff decreed for the plaintiffs; and whilst the case was pending in appeal, Joogul Kishore (one of the respondents) died, of which notice being given to the court, the principal sudder ameen issued the usual notice for the heirs of the deceased to appear and carry on the case. Six weeks having elapsed without any one appearing, the principal sudder ameen, on the statement of the appellants that the deceased had left a son, Ishan Chundur Das, ordered his name to be recorded as respondent in the room of the deceased Joogul Kishore, and went on with the case, which terminated in the reversal of the moonsiff's decision.

This is altogether irregular. The principal sudder ameen having admitted the name of Ishan Chundur Das as a respondent, should have issued notice to him individually to appear before he went on with the case.

I therefore remand the proceedings to the principal sudder ameen, with instructions to restore the case to his file, and proceed to dispose of it *de novo* as above directed.

THE 31ST JULY 1848.

PRESENT:

C. TUCKER, Esq.

JUDGE.

CASE No. 214 OF 1848.

IN the matter of the petition of Kanoo Pundah and Anam Pundah, filed in this Court on the 26th June 1848, praying for the admission of a special appeal from the decision of Mr. E. Deedes, judge of zillah Cuttack, under date the 22d March 1848; amending that of Baboo Taruknath Bidia Saugor, principal sudder ameen of the said zillah, under date the 17th August 1847, in the case of Ghun Pundah, plaintiff, *versus* petitioners and another, defendants.

The details of this case will be found at pages 22 and 23 of the Decisions for zillah Cuttack, for the month of March 1848.

Purmessur Pundah and others sued Bimlah Dey, the wife of Meenoo Pundah, deceased, on a bond executed by her husband for a certain sum of money, in which bond an 8 annas' share of the *surburakaree* of *mouzah* Ayinda was pledged as security for the payment of the money. A decree passed for the plaintiffs; and the 8 annas' of *mouzah* Ayinda was advertized for sale as the property of Bimlah Dey, in execution thereof, and purchased by Ghun Pundah, the plaintiff in this suit.

Before he could get possession he was obliged to bring this suit; the defendants in possession stating the share of Bimlah Dey to consist of $\frac{3}{16}$ only.

The principal sudder ameen went into the merits of the case; and decided that the plaintiff was entitled to only $\frac{3}{16}$ of the village, such having been the extent of the rights and interests of Bimlah Dey, or rather of her deceased husband Meenoo Pundah.

The judge in appeal decreed $\frac{8}{16}$ to the purchaser, on the grounds of the decree between Purmessur and Bimlah Dey; and states in his order that no enquiry has been made as to what share in the *mouzah* Ayinda Bimlah Dey, the wife of Meenoo Pundah, may be entitled to.

The defendants in this case were not parties to the suit brought by Purmessur against Bimlah Dey, consequently that decree can in no way affect their rights. Moreover, when the judge remarks that he has made no enquiry as to the share Bimlah Dey was possessed of in the village, he has omitted to enquire into the very issue on which the case depends. Sales in execution of decrees convey to the purchaser merely the rights and interests of the party or parties answerable under the decree; and when these are disputed, as in this suit, the only point for the court to enquire into is the extent of those rights.

Under these circumstances, I annul the decision of the judge; and remand the proceedings with directions to restore the case to the file, and proceed *de novo* as above indicated.



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EERATA IN APRIL DECISIONS.

Page 280, line 9, for 2 read 12 annas, &c.

„ 335 „ 1 for 18th read 19th April.

„ 363, title of case, read Baboo Purtab Nurain and Omrao Bahadoor, Appellants, (Plaintiffs.)

THE 1ST MAY 1848,

PRESENT:

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 374 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, June 12th, 1847.

PITUMBUR RAE, APPELLANT, (PLAINTIFF),

versus

RAE RADHA GOVIND SINGH, THAKOORDAS GOSAIN,
AND MUSST. GOPEE DASEE, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellant—J. G. Waller and Bunsee Buddun Mitr.

Wukeel of Respondents—Kishen Kishore Ghose.

SUIT for *Sicca* rupees 6,001, (Company's rupees 6,480-0-2,) the price of a *putnee talook*, in the *mehal* lot Hutteesalla.

It appears that plaintiff purchased the *putnee* at the price of one year's *jumma* in 1244 B. S. That, on the 5th *Bysakh* 1252, lot Hutteesalla was sold by auction in satisfaction of a decree against the zemindar, Rae Radha Govind Singh, and purchased by Thakoordas Gosain; that, in consequence of a claim brought forward by Radha Govind's mother, Musst. Gopee Dasee, the sale was not confirmed till 20th *Chyete* 1252; that, in the mean time, plaintiff continued to pay his rent, partly to the collector and partly to Radha Govind; and that on the 8th *Sawun* 1253 the estate was sold for arrears of Government revenue, and purchased by one Gunga Purshad for rupees 61,000. Plaintiff urges that no arrears of rent were due from him at the time of sale; and that, therefore, under Section 17, Regulation 8 of 1819, he is entitled to recover damages out of the surplus sale proceeds at the credit of the defaulting zemindar.

The principal sudder ameen has gone into this plea with reference to the regulation quoted; and being of opinion that the payments made to Radha Govind, between the date of sale and date of confirmation, cannot be allowed by the court as payments of rent, and, moreover, that there was a balance due, after confirmation, on account of 1253, has dismissed the claim.

It is evident that the law which has governed this decision is inapplicable. It has reference only to sales under Regulation 8, 1819, and provides for the case of the *dur-putneedar*. It has nothing to do with sales for arrears of Government revenue and

the immediate tenants of the zemindar. By Act 1 of 1845, as by the previous sale laws, all tenures created by a zemindar, subsequent to the settlement, are absolutely void in case of a sale for arrears; and no redress is provided for the sufferers. The surplus sale proceeds are the exclusive property of the ex-zemindar. It is, therefore, immaterial to the issue of this suit whether plaintiff was, or was not, in balance at the time of sale,—in neither case is he entitled to what he claims. He has alleged, indeed, in his plaint, and again in his appeal to this Court, that Gunga Purshad, the last purchaser, is the nephew of Thakoordas, and that the sale was collusive and fraudulent,—Thakoordas being still the real owner. But the remedy for such cases is provided by Section 29, Act 1 of 1845. Plaintiff has taken a wrong course in suing for damages.

Concurring with the principal sudder ameen in the conclusion at which he has arrived, though not in the steps by which he has reached it, I dismiss the appeal with all costs against appellant.

THE 2D MAY 1846.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 177 OF 1846.

IN the matter of the petition of Syud Keramut Ali, filed in this Court on the 20th April 1846, praying for the admission of a special appeal from the decision of Mr. Bentall, judge of Jessore, under date the 7th January 1846; reversing that of the principal sudder ameen of Jessore, under date 27th June 1845, in the case of Syud Keramut Ali, plaintiff, *versus* Goureenath Ghose, defendant.

It is hereby certified that the said application is granted on the following grounds.

The following decision of the zillah judge shows the nature of this case.

‘ Syud Keramut Ali instituted a suit, on the 15th April 1843, to fix the rent which Goureenath Ghose, his tenant, should pay for 581 *biggahs* of land in a *jeel* in *Ducatea* village; and as no proof of any objection which was raised was produced, the principal sudder ameen gave a decree in favor of the plaintiff on 27th June 1845. An appeal is now made against the decree. By the plaint it was shown, that an *umulnameh* had been given to Goureenath by the collector, and the property about which the dispute exists is under the management of the local agents, of

whom the collector is *ex-officio* one. The *umulnameh* was produced in court before me; and as it was written on unstamped paper, I had the suspicion that that was the reason why it had not been produced before the principal sudder ameen. If it had been granted by authority of the Board of Revenue, it might not require a stamp; and had it been unintentionally illegal, a stamp might perhaps be obtained for it. The case was therefore put off for a month, that the stamp (if required) might be put on the document. It has now been reproduced in court, with the full undoubted legal stamp. It has internal evidence of having been granted in good faith, in consequence of a proceeding of the same authority dated 1st September 1835, which proceeding was written after a correspondence with the commissioner. The *umulnameh* bears date 18th September 1835; and I believe it to be genuine and legal, and given in good faith by a local agent, who was competent to give it, and that it cannot be upset against the will of the grantee.

‘According to the *umulnameh*, Goureenath holds the lands by an *ootbundee* tenure. The possibility of cultivating the lands depends on the variableness of the year; and although it might have been inexpedient, with reference to the facility of collecting the rent, to have granted such a tenure, yet it cannot now be broken except by mutual consent; and a fixed rent cannot be established for the land, the rent must vary with the quantity cultivated year by year, and must be $8\frac{1}{2}$ annas *Sicca* for every cultivated *biggah*. I therefore reverse the decree of the principal sudder ameen, inasmuch as one fixed rent for each following year cannot be determined. The respondent must pay the costs of both suits.’

It is asserted in the petition of application for the admission of a special appeal, that the *umulnameh* of 1835 was reversed by the commissioner of revenue in the year 1838, as will be seen on reference to a proceeding of that officer dated 30th November of that year. To this fact the judge makes no reference; nor does he give any detail of the orders of the revenue authorities by which the *umulnameh* was sanctioned, which it is essential he should do, in order to a right understanding of the merits of the case.

I accordingly admit the appeal, and remand the case for re-trial. The judge will call for, and peruse, the correspondence between the revenue authorities in regard to the lease granted to the defendant, specifying in his decree the circumstances under which it was given, and the authority by which it was confirmed. *Secondly*, he will enquire whether the lease so confirmed was subsequently annulled; and, if so, under what circumstances, and by what authority. *Thirdly*, he will take into consideration the competency of such authority to cancel the lease previously given.

THE 2D MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 66 OF 1848.

IN the matter of the petition of Boolye Kewut sent to this Court on the 24th February 1848, praying for the admission of a special appeal from the decision of the principal assistant commissioner of Nowgong, under date the 6th December 1847; affirming that of the moonsiff of Nowgong, under date the 10th September 1847, in the case of the petitioner, plaintiff, *versus* Doteeram Kewut, defendant.

It is hereby certified that the said application is granted on the following grounds.

This was an action for recovery of a small patch of ground, of which the plaintiff asserts he was dispossessed by the defendant. The ground seems to belong to Government, and both parties claim to hold under leases granted to them.

The plaintiff was unsuccessful in both the lower courts. He asks, however, that the collector might be referred to as to the truth, or otherwise, of his statement. His request was a proper one, and should have been complied with.

Considering the decision incomplete in the absence of such reference, I admit the appeal; and remand the case, in order that it may now be made, and the case decided *de novo*.

THE 2D MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 63 OF 1848.

IN the matter of the petition of Brijchundur Banojea Chowdhree, filed in this Court on the 9th March 1848, praying for the admission of a special appeal from the decision of Mr. Swetenham, judge of Dacca, under date the 6th December 1847; affirming that of the principal sudder ameen of Dacca, under date 16th May 1845, in the case of Gouree Shunkur Chatterjee and others, plaintiffs, *versus* Brijchundur Banojea Chowdhree, defendant.

It is hereby certified that the said application is granted on the following grounds.

The following decree of the zillah judge sets forth the particulars of this case.

“ Suit for possession of *bheetee* land, with mesne proceeds, valued at rupees 63.

“ The moonsiff of Nuraingunge originally decreed the suit to plaintiffs: an appeal was preferred to the judge. It appeared defendant had pleaded the land *birmuttur*, or *lakhiraj*, whereupon the moonsiff's decision was reversed, and the case was referred to the principal sudder ameen for trial *de novo*.

“ The collector having reported the land not rent-free, the principal sudder ameen decreed to plaintiffs, on the grounds that the lands were granted for the occupancy of certain individuals; that they had abandoned them to reside elsewhere; and that the plaintiffs had the right to resume their land, which had not been permanently alienated.

“ In appeal it is urged, that appellant acquired the property by purchase from the heirs of the original grantees, who had full powers to dispose of it at pleasure. The title deed filed by appellant merely contains this condition, that ‘ the grantees shall occupy the ground *pootroo pootradee*,’ or hereditarily. It does not specify relinquishment of proprietary right, or convey, in direct terms, the right of sale, or gift. The principal sudder ameen stated in his decree that the words, *pootroo pootradee*, restrict the occupancy to the heirs of the grantees; that if the land goes into the hands of others, the tenure lapses, and the title of the original proprietor revives. The deed, however, had the title of *ootsurg*. It was, therefore, referred to the *pundit* to report what was conveyed by a gift under such title: whether simple occupancy, or privilege to convey by deed of sale, gift, or otherwise? The *pundit* declared that the privilege to sell, or gift the property was conveyed in a deed styled *ootsurg*. Had then the appellant acquired a legal title? it appears not. There was no witness to the deed; and as it purported to have been executed in 1178, appellant could not bring any evidence, or proof of any nature to establish its validity. The deed too was a grant to three persons, Ram Dhun, Pran Dhun, and Ram Lochun. Appellant purchased in 1245 from Kaleepurshad and Petumber, the heirs of Ram-Lochun only; and when questioned what right they had to sell the rights and interests of the other two original grantees, whose heirs are in existence, appellant could only assume they had the right, as the absentee heirs offered no objections. The respondents deny that the deed exhibited was the original document granted; that it (the original document) was not an *ootsurg*, and there are grounds for rejecting it, inasmuch as Kalee Purshad stated in his answer, as defendant, that the boundaries (the *hudbundee*) of the land were inserted in the original *ootsurg*, and in the document filed by appellant there is no allusion to the boundaries.

“ There are no grounds, therefore, for impugning the decision of the principal sudder ameen, which is hereby affirmed, and the appeal dismissed with costs.”

The plaintiffs seem, from the concluding part of the judge's decree, to have admitted that a grant of some kind was made; and it was not open to the plaintiffs to dispute the legality of the transfer to the petitioner, on the ground that the heirs of all the grantees were not parties to the transfer. The heirs themselves might have disputed it; but this was not the point at issue between the plaintiffs and the petitioner, and the judge has gone out of his way in bringing forward this as a plea adverse to the petitioner in the present case, which involves the right, or otherwise, of the plaintiffs to the whole property sued for, and not the question of the legality of a sale made by certain of the share-holders in the absence of the rest.

One most material point has not been alluded to by the judge. The petitioner alleges that he and the parties from whom he purchased, have been in possession since 1178 B. S.,—that is for a period of upwards of 70 years. This point should have been fully enquired into; and, if established, then would arise the question whether they could be legally dispossessed. I admit the appeal, and remand the case for re-trial with reference to the foregoing observations.

THE 3D MAY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 64 OF 1848.

IN the matter of the petition of Jeetun Singh, filed in this Court on the 9th March 1848, praying for the admission of a special appeal from the decision of Wm. St. Quintin, Esq., additional judge of zillah Behar, under date the 7th December 1847; affirming that of Buddeeoodeen Ahmud Khan, sudder ameen of the said zillah, under date the 26th June 1846, in the case of Luchmun Purshad, plaintiff, *versus* Jeetun Singh and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

A report of the case will be found amongst the printed decisions of zillah Behar of December 1847, from which, and the detail set forth in the judgment of the sudder ameen, it appears that the petitioner claimed a right of possession to the lands contested on the score of a lease, the terms of which were still in force; but

that his claim was disallowed and treated as a fraudulent collusion in connexion with the proprietor, Rajah Himmud Ali Khan, to deprive the plaintiff, Luchmun Purshad, of his just right to possession under an expired mortgage from the said rajah.

I do not think that a due enquiry has been made in either of the lower courts, into the claim preferred by the petitioner. It is not pretended that there was any other *teekadar* connected with the lands or the parties than the petitioner; and in the petition presented by the plaintiff, to foreclose the mortgage, he distinctly states the fact of his having obtained an *ikrarnamoh* 'from the *teekadar*' of the estate. This *ikrarnamoh* was not called for, nor was any enquiry made regarding its existence, or its purport. Again, the petitioner pleaded that the documents which the lower courts rejected as not valid, had already been filed and acknowledged as genuine in a preceding suit; and that he had further evidence to substantiate his right in preference to the plaintiff's: nothing was done however, or allowed to be done, to determine the truth of this assertion, or the value or demerit of the proffered evidence; and altogether I do not consider the petitioner to have been fairly dealt by.

I admit the appeal prayed for; and remand the case to be disposed of after such further enquiry as is above indicated to be wanting, and on a due consideration of any further evidence which the parties may adduce respectively.

The usual order will issue in regard to stamps and costs.

THE 3D MAY 1848.

PRESENT:

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 71 OF 1848.

IN the matter of the petition of Rajah Himmud Ali Khan, filed in this Court on the 13th March 1848, praying for the admission of a special appeal from the decision of Wm. St. Quintin, Esq., additional judge of zillah Behar, under date the 7th December 1847; affirming that of Buddeecooddeen Ahmud Khan, sudder ameen of the said zillah, under date the 26th June 1846, in the case of Luchmun Purshad, plaintiff, *versus* Rajah Himmud Ali Khan and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

A report of the case will be found amongst the printed decisions of zillah Behar for December 1847, and the grounds of admission

of this appeal are set forth in the certificate of this date on the petition of Jeetun Singh, No. 64. The petitioner, Himmud Ali Khan, is the proprietor of the estate of which Jeetun Singh claims to be *teekadar*; and the appeal is against the same judgment against which Jeetun's appeal has been admitted.

The order passed in No. 64, will be considered applicable in the present instance.

THE 3D MAY 1848.

PRESENT:.

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 48 of 1845.

Regular Appeal from a decision of the Principal Sudder Ameen of Zillah Hooghly, Mynooddeen Sufdur.

LUKUN CHUNDUR SEAL AND BUHRUT CHUNDUR
SEAL, APPELLANTS, (DEFENDANTS,)

versus

JUGGUT SEYTHANEE, WIDOW OF JUGGUT SETH INDUR CHUNDUR, AND MOTHER AND GUARDIAN OF GOVIND CHUNDUR, MINOR, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellants—Abas Ali and Kishen Kishore Ghose.

Wukeels of Respondent—Lootf-ur Ruhman, J. G. Waller, and Gholam Sufdur.

SUIT laid at Company's rupees 12,168, 8 annas, 10 gundahs, 1 cowrie, for possession on 8 annas' share of a *mocurruree*, or permanent tenure, of *turf* Manikpore *oorf turf* Keerpoy, at the fixed rent of 1,140 *Sicca* rupees, and of *talook* Umuli Keerpoy at the fixed rent of 38 *Sicca* rupees.

The two tenures in question were sold in execution of a decree against one Dhokul at public auction, or rather his right and interest in them; and purchased by appellants (defendants.) Respondent (plaintiff) objected at the time, claiming one half of them, as now, for her son. She was referred to a regular suit, if molested in her right and possession by the purchasers. The purchasers obtained possession of the whole; in consequence, respondent (plaintiff) instituted this suit. The principal sudder ameen deeming the plaintiff to have established her claim, decreed it. The plaintiff (respondent) claims on inheritance from one Hurik

Chund, father of her husband, Indur Chund, whose name appears as joint proprietor with Ubhy Chund, nephew of Hurik and father of Dhokul, in the zemindar's register so far back as 1207; and she endeavours to establish her possession until 1240 B. Æ. by means of a *kuboolcut*, or counterpart lease, from Dhokul who farmed, as she alleges, her half share in 1233 B. Æ., which she files, and by means of several receipts for payments of the fixed rent with the zemindar's seal and signature, dated from 1233 to 1240 B. Æ.

The appellants deny her claim, and insist that the whole of both tenures belonged to Dhokul alone. In proof of which they file copy of an answer of Hurik Chund in a suit against him and Ubhy Chund for rent of one of these tenures, in which he declares he had no concern in it, and that it belonged wholly to Ubhy Chund. That suit was decided in favor of Ubhy Chund in 1807. *Secondly*, they file copy of a decision under Regulation 15, 1824, by which Dhokul was declared to be alone in possession of the tenures, and Keerut Chund's (son of Oodhy Chund, brother of Ubhy Chund,) alleged possession rejected.

It appears from documents on record, that Hurik Chund and Ubhy Chund were registered in the zemindaree office of the Burdwan *raj* as proprietors of the tenures in question after the death of Hoshal Chund, so far back as 1207 B. Æ. That afterwards, a portion called lot Bumpore of the zemindaree of the Burdwan *raj* was sold for arrears of revenue, and eventually, in 1212 B. Æ., came into the hands of one Dwarkanath Baboo. *Talook* Umuli Keerpoy, one of the two tenures, was situated in lot Bumpoor, and Dwarkanath sued Hurik Chund and Ubhy Chund for full rent of the said *talook*. The suit was decided against the Baboo, and the tenure upheld as valid in 1807, and that decision affirmed in appeal in 1809. Hurik Chund in his answer in that suit disclaimed any concern in the *talook*, declaring the whole *mehal* to belong to Ubhy Chund alone. The words in the answer are:—‘*turf* Keerpoy, since the death of Hoshal Chund, has been in the possession of Ubhy Chund. The plaintiff has sued me without cause. I have nothing to say to Keerpoy.’ It has been urged for respondent, that as the suit was on account of Umuli Keerpoy, such an admission regarding *turf* Keerpoy was utterly irrelevant, and must have been unauthorized, if not fraudulent, and therefore good for nothing. However, *turf* Keerpoy and Umuli Keerpoy together form one *mehal*, or estate, and the small tenure Umuli Keerpoy is merely an appendage to the large tenure *turf* Keerpoy; and the intention of the defendant, Hurik Chund, in using the designation of the chief tenure, was clearly to intimate that he had no concern in the *mehal* at all. This is further evident from his varying the designation of the *mehal*,—first ‘*turf* Keerpoy,’ then simply ‘Keerpoy.’ Thus the admission was by no means irrelevant. Neither could it have been

unauthorized, or fraudulent ; for no objection was made to it on the part of Hurik Chund in the appellate court. There is then good evidence that Ubhy Chund was in sole possession in 1807. In 1825, Keerut Chund, son of Oodhy Chund, contested possession on a *moiety* of the *mehal* with Dhokul ; and a decision was given under Regulation 15, 1824, upholding the sole possession of Dhokul on the whole of the *mehal*, in which Keerut must have acquiesced as he never sued regularly for its reversal. Here then is good evidence that Dhokul succeeded Ubhy Chund in the sole possession of the *mehal*. Not a tittle has been produced to prove that either plaintiff's husband, or his father, Hurik, ever held possession from 1807 until the sale of the *mehal* in execution of the decree against Dhokul, except the alleged *kuboolent*, or counterpart lease, from Dhokul, dated 29th *Bysack* 1233 B. Æ., or 10th May 1826, and the receipts for rent from the Burdwan *raj*. The deed was not filed or mentioned till 1842, and then only *after* the final decision of the zillah judge, upholding the sale, had been pronounced ; although a petition in plaintiff's *sow's* name was presented on the very day of sale, 20th May 1835, claiming one half of the *mehal*, and subsequent petitions against the sale presented by plaintiff. The receipts do not specify who paid the rent, whether Dhokul on his own account, or for plaintiff as her farmer, and therefore prove nothing. They are not for her share, or moiety of the *mehal*. Since, then, plaintiff has failed to produce satisfactory evidence of her own, or her husband's possession on the *mehal* within 12 years from the date of her suit, and defendants have filed strong proofs of sole possession on the part of Ubhy Chund and Dhokul, during nearly 30 years previous to their purchase, the claim of plaintiff is inadmissible. The decision of the principal sudder ameen is reversed ; and costs in full of both courts awarded against respondent (plaintiff.)

THE 3D MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 800 OF 1846.

IN the matter of the petition of Ranee Kutteeanee, filed in this Court on the 23d October 1846, praying for the admission of a special appeal from the decision of J. C. Brown, Esq., judge of zillah Nuddea, under date the 30th June 1846 ; reversing that of Ram Lochun Ghose, principal sudder ameen of the said zillah, under date the 9th June 1843, in the case of Nukoor Munnee Dibbea, plaintiff, *versus* Ranee Kutteeanee, defendant.

The plaintiff in this case is part proprietress of *mouzah* Hurnuggur, and the defendant, Ranees Kutteeanee, is proprietress of *mouzah* Nyacole, both in *pergunnah* Ookra; and the suit regarded certain lands which the parties claimed as appertaining to their respective villages. The principal sudder ameen, declaring his inability to discover to which of the contending parties the lands belonged, divided them equally between them. On appeal, the judge, reversing the decision of the principal sudder ameen, awarded the whole of the disputed lands to the plaintiff, Nukoor Munnee Dibbea. The judge states in his decree:—‘The defendant has only exhibited half a dozen *ryuts’ kubooleuts*, which are often easily fabricated, on account of receipts and balances, and, as a precedent, a decree passed by Mr. Henry Moore when judge of this zillah, regarding some other land (and not having any reference to this in dispute) which he ordered to be divided, though not for the same reason.’

The application for a special appeal is founded on this decree of Mr. Henry Moore’s, which was rejected by the judge as not bearing any reference to the present case. In the case disposed of by Mr. Henry Moore, the plaintiff was proprietor of the same village, Hurnuggur; and the defendant of a village called Saheb-nuggur, which is situated immediately west of Nyacole. These two last named villages are separated from Hurnuggur to the north by the dried bed of the river Kurreea; and in the case decided by Mr. Moore, Hurnuggur was declared to lie north of the bed of the Kurreea river; and the portion of the lands then in dispute, situated to the south, were decreed to the proprietor of Saheb-nuggur. Hence this decree is a document of great importance in this case, for the lands now in dispute are situated south of the dried up bed of the river Kurreea; and, according to Mr. Henry Moore’s decision, the proprietors of *mouzah* Hurnuggur have no claim to the southward.

Considering, therefore, that the judge has not sufficiently considered the bearing of Mr. Henry Moore’s decision in the present case, I remand the proceedings for revision under the provisions of Clause 2, Section 2, Regulation 9, 1831.

THE 3D MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 801 OF 1846.

IN the matter of the petition of Ranees Kutteeanee, filed in this Court on the 23d October 1846, praying for the admission of a special appeal from the decision of the judge of zillah Nuddea,

under date the 30th June 1846; reversing that of the principal sudder ameen of that district, under date 9th June 1843, in the case of Kalidas Banerjee, plaintiff, *versus* Ranee Kutteeanee, defendant.

The facts and circumstances of this case are the same as those recorded in the preceding case (No. 800), and a similar order is passed in this instance.

THE 3D MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 802 OF 1846.

IN the matter of the petition of Ranee Kutteeanee, filed in this Court on the 23d October 1846, praying for the admission of a special appeal from the decision of the judge of zillah Nuddea, under date the 30th June 1846; reversing that of the principal sudder ameen of that district, under date 9th June 1843, in the case of Ramdhun Banerjee, after his demise, Nukoor Munnee Dibbea, plaintiff, *versus* Ranee Kutteeanee, defendant.

The facts and circumstances of this case are the same as those recorded in the preceding case (No. 800), and a similar order is passed in this instance.

THE 3D MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 803 OF 1846.

IN the matter of the petition of Ranee Kutteeanee, filed in this Court on the 23d October 1846, praying for the admission of a special appeal from the decision of the judge of zillah Nuddea, under date the 30th June 1846; reversing that of the principal sudder ameen of that district, under date the 9th June 1843, in the case of Unnoda Purshaud Banerjee and others, plaintiffs, *versus* Ranee Kutteeanee, defendant.

The facts and circumstances of this case are the same as those recorded in the preceding case (No. 800), and a similar order is passed in this instance.

THE 3D MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 804 OF 1846.

IN the matter of the petition of Rane Kutteeanee, filed in this Court on the 23d October 1846, praying for the admission of a special appeal from the decision of the judge of zillah Nuddea, under date the 30th June 1846; reversing that of the principal sudder ameen of that district, under date the 9th June 1843, in the case of Unnoda Purshad Banerjee and others, plaintiffs, *versus* Rane Kutteeanee, defendant.

The facts and circumstances of this case are the same as those recorded in the preceding case (No. 800), and the same order is passed in this instance.

THE 3D MAY 1848.

PRESENT:

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 97 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, December 30th, 1845.

RASBEEHAREE KOONWUR AND AMAN SING
JEMADAR, APPELLANTS, (PLAINTIFFS,)

versus

CHUNDRABULLEE DIBBEA, MOTHER, AND BHOBUN
MAYE, WIDOW OF BHOWANEE KISHWUR, DECEASED,
RESPONDENTS, (DEFENDANTS.)

*Wukeels of Appellants—Pursun Komar Thakur, Ameer Ali, and
Kishen Kishore Ghose.*

*Wukeels of Respondents—J. G. Waller and Gobind Chundur
Mookerjee.*

CLAIM rupees 22,771, with interest, under an instalment bond dated 11th Bhadoon 1241 B.

This suit was brought on the 5th October 1844, or in *Assin* 1251 B., to recover the amount due under the abovementioned bond, said to be executed by the deceased Bhowanee Kishwur and his mother, Chundrabullee. In the mean time Bhowanee Kishwur had died, and his widow, Bhubun Maye, had succeeded to his property. The case is stated and decided as follows by the principal sudder ameen on the 30th December 1845 :—

‘ This is a claim on *kistbundee* bond, dated the 11th *Bhadoo* 1241 B. S., laid at rupees 22,771-0-3, being the balance of principal and interest due thereon. The plaintiffs state that Chundrabullee Dibeea and her son, the late Bhowanee Kishwur Chowdhree, had money and other dealings with them; and that, on making a settlement of their accounts, they found themselves rupees 19,439 in the debt of the plaintiffs; that they then paid rupees 811, and executed a *kistbundee* for the remainder, rupees 18,628. That, of this amount, the plaintiffs have received, in liquidation, rupees 6,628, and for the recovery of the balance this suit is instituted. Bhowanee Kishwur being since dead, this action is brought against his mother and widow, the defendants above named, who are in possession of the estate.

‘ Bhubun Maye Dibeea, the widow of the late Bhowanee Kishwur, pleads in her answer, that, at the time the *kistbundee* is alleged to have been given by Bhowanee Kishwur Chowdhree, he was a minor, and that his estates were in the hands of the court of wards; and that he was not put in possession of them till after the expiration of his minority, which took place in *Poos* 1241 B. S. She further pleads, that a claim for the recovery of the price of a horse, and other articles included in the same *kistbundee*, had been previously brought on by Doloo Koonwur, the brother of Rasbeeharee Koonwur; and though decreed in his favor by Moulvee Jullaloodeen, the former principal sudder ameen, that decision was reversed by the zillah judge, on the ground of Bhowanee Kishwur’s minority, which latter decision was upheld in appeal by the Sudder Dewanny Adawlut. It is therefore also urged, that the institution of the present suit is barred by Section 16, Regulation 3, 1793.

‘ The answer filed by Chundrabullee Dibeea, supports that of the foregoing defendant.

‘ The point for determination, is, whether at the time of the execution of the *kistbundee* (on which this claim is founded) was Bhowanee Kishwur Chowdhree a minor, or was he not; and, if the former, can the plaintiffs legally recover on a *kistbundee* granted by a minor?

‘ From a perusal of the *junnum putreeka* filed in the collector’s office, which has been laid before this court for inspection on the requisition of the defendants,—the *roobukaree* of the collector of

Mymensingh, dated 27th December 1834,—the decree of the zillah judge, Mr. G. C. Cheap, dated 5th June 1838, in reversal of that passed by Moulvee Jullalooddeen, late principal sudder ameen,—the decree of the Court of Sudder Dewanny Adawlut, upholding Mr. Cheap's order,—the file of the former suit No. 830 (in which Doloo Koonwur was complainant) and the *kistbundee* filed therein,—as well as the depositions of three witnesses adduced in support of the pleas urged by the defendants, I am clearly of opinion, that, at the period of the execution of the *kistbundee* in question, Bhowanee Kishwur Chowdhree was a minor; and that, consequently, the plaintiffs are not entitled to recover thereon. Besides this, this suit is not cognizable on the ground that an action for the recovery of a portion of the amount included in *this kistbundee*, had been heard and determined already by competent authority. (Vide Section 16, Regulation 3, 1793.)

‘The plaintiffs have urged that Chundrabullee Dibeea had also executed the *kistbundee* jointly with her son, and have brought forward three witnesses in support of *that* assertion; but this court does not consider their testimony worthy of the slightest reliance. Further, from an inspection of the bond, it does not appear that the name, Chundrabullee, inserted therein, was ever affixed as debtor, but merely as a witness to the execution of the deed by her minor son; and though the plaintiffs now state, that the *sunmookh*, inserted over her signature, was *not* there when *she* gave the *kistbundee*, and that it *must* have been written after the case in which it was filed *had* been sent for *deposit* in the *muhafiz duffer* of the zillah judge, yet *that* statement is clearly refuted by the decree passed in favor of Doloo Koonwur by Moulvee Jullalooddeen, the principal sudder ameen. The fact of the *sunmookh* having been at *that* time written on the said deed, is sufficiently apparent, and there can be no doubt *the writing was thereon long before the deed had ever been filed in court*. I would therefore, on the grounds above assigned, dismiss the claim made by the plaintiffs.’

From this decision the plaintiffs appeal. I see no sufficient reason to doubt that the deed was executed and signed in its present state by Bhowanee Kishwur and his mother; but the mother's signature has the word ‘*sunmookh*’ written just above it,—the precise meaning of which is ‘*in the presence of.*’ It must, therefore, be looked on as the signature of a witness, and does not render her liable. The signature of Bhowanee Kishwur is proved; but it is established that at the time of signing it he was a minor under the tutelage of the court of wards. A *junnum puttree*, or register of births, obtained from the collector's office, is filed, shewing that he had not then attained the age of 18 years, the limit of minority established by law. There is nothing to

throw doubt on the genuineness of this document; the signature of Bhowanee Kishwur is consequently useless.

Further, the contents of the bond shew, that it is a promise to repay, by instalments, sums of money lent on bonds and otherwise to Bhowanee Kishwur at various times during his minority; the amount of each former bond, or of the money lent, is no where mentioned, nor the dates of supplying the items of cash delivered without bond. The former bonds were thus evidently invalid; and from the manner in which they are referred to in the instalment bond, there is ground to suspect that the calculation in them is in opposition to the usury laws, more especially as the borrower was a minor.

It remains to consider whether Bhowanee Kishwur has, since attaining majority, rendered the bond binding on him by the payment of money in liquidation of it, or any other act of acknowledgment. The entries of payment on the reverse of the bond are not of this description; in fact they are not acts of Bhowanee Kishwur at all, nor proof of any such acts. It seems that the plaintiffs held from him a farm, and the payments entered on the back of the bond are of sums realized by the plaintiffs from the farm, and due as rent from them to Bhowanee Kishwur. These they have not paid to Bhowanee Kishwur, but to themselves on Bhowanee Kishwur's account, crediting the same to Bhowanee Kishwur on the back of the bond. There is no authority from Bhowanee Kishwur empowering them to do this. In fact, there is not a word in the instalment bond shewing any connection of the bond with the farm: these entries are therefore no acknowledgment on the part of Bhowanee Kishwur. On the whole, the transaction as regards the plaintiffs is of a very suspicious nature: they have supplied money at various times to a minor under the tutelage of the court of wards, not for his maintenance as an allowance for this purpose is made by the court. From the record it is not possible to discover in what sums, and when this money was lent. In doing this the plaintiffs knew that they had no legal claim, and were conscious of the risk they ran: it is therefore no hardship on them to reject their claim. It is also observable, that they have waited till the death of the borrower before bringing forward their claim. I consider the bond invalid, with reference to the minority of the person executing it and to the nature of its contents; and I find no act of Bhowanee Kishwur, since his attaining majority, such as to amount to an acknowledgment of the transaction. The principal sudder ameen's order, dismissing the claim, is therefore affirmed. Costs against appellants.

THE 4TH MAY 1848.

PRESENT :

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 391 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Rajshahye, May 31st, 1847.

PROSONATH RAEI, APPELLANT, (PLAINTIFF,)

versus

SHUNKUREE DASSEE AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellant—Gholam Sufdur.

*Wukeels of Respondents—Pursun Komar Thakur, J.
G. Waller, and Ameer Ali.*

SUIT laid at rupees 14,955-5-5, to annul the *putnee* tenure of Madhoburrea and others, and recover mesne profits for 1236 B. S.

Plaintiff is the adopted son of Prannath Raei, the husband of the defendant, Shunkuree Dassee, who died in 1235 B. S. In 1236, his estate was taken under the management of the court of wards, and so continued till plaintiff attained his majority in 1251. Plaintiff alleges that after the death of his adoptive father, and when the estate was about to be taken charge of by the court of wards, the defendant, Shunkuree Dassee, gave a *putnee* of certain villages, *benamee*, to one Rughonath Manee; herself retaining possession of them. He therefore sues her, together with the heirs of Rughonath Manee, the collector as agent of the court of wards, and Hurrischundur Shah Chowdhree, the present possessor of the *putnee*, who purchased it at auction sale in September 1841, for annulment of the tenure, and recovery of the difference between the mofussil collections and the *putnee* rents from the date when the property was taken under the management of the court of wards.

It appears that Rughonath Manee was the natural father of the plaintiff; and it is stated on the part of the defendant, Hurrischundur, that the *putnee* (the *pottah* for which bears date in 1234, the time of the adoption,) was granted by Prannath in consideration of that arrangement, and as a provision for the father of the adopted child.

This is likely enough; while the statement of the plaintiff is in the highest degree improbable. It is hardly to be supposed that Rughonath Manee would have conspired with the widow of the deceased zemindar to defraud his own son, and that not for his own but for the widow's benefit. It is shewn, that when the estate was taken under the court of wards, he attended before the collector

with the title deeds of his *putnee*; and 13 years after appealed to the commissioner against its sale. It is also in evidence, that Shunkuree Dasee did retain possession of some portions of the property, both real and personal, and on applications made by the guardian to the collector was compelled to surrender them. It cannot be doubted that if she had fraudulently kept possession of those villages, a similar application would have been made regarding them. On these grounds, added to the direct evidence of the grant adduced by the defendant, Hurrischundur, the principal sudder ameen dismissed the suit. Considering his decision to be entirely in accordance with the facts and probabilities of the case, I affirm it, and dismiss the appeal with all costs against the appellant.

THE 4TH MAY 1848.

PRESENT:

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 234 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, March 10th, 1847.

RAMPURSHAD JEMADAR, APPELLANT, (DEFENDANT,
WITH ANOTHER,)

versus

MUSST. JUMOONA, WIDOW, A PAUPER, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Bunsee Buddun Mitr.

Wukeel of Respondent—Gopal Kishen.

CLAIM rupees 7,586, principal and interest, on account of jewels and other property, due from defendant.

In this case evidence was filed before the principal sudder ameen on both parts; and, on the 10th March 1847, he recorded his decision in Persian to the following effect:—

‘It appears, after due consideration, that the plaintiff’s claim against the defendant, Gokulchundur, will not stand; and although from the evidence of the plaintiff’s witnesses, a strong presumption arises that the other defendant, Rampurshad, by means of a power of attorney (*mookhtarnamēh*) on the part of plaintiff, has surreptitiously obtained possession of much property left by Kulundur Singh and devised to plaintiff, still, in consequence of the sex and ignorance of the plaintiff and the sharp practice of the defendant,

the claim of plaintiff and the fact of surreptitiously taking possession on the part of defendant, is not so established as to justify a decree in plaintiff's favor; but, from the depositions of Moonshee Gholam Russool, *wukeel*, and of Juswunt Shah, witnesses of plaintiff, and especially from the statements of the parties themselves, it appears that through the said Gholam Russool a discussion took place between the parties, with a view to an adjustment in this manner,—that the defendant, Rampurshad, should pay rupees 425 to plaintiff, and plaintiff should withdraw her action. That defendant did accordingly pay rupees 425 to Gholam Russool as a deposit on this condition, that, after the action had been withdrawn, he should pay it to Plaintiff; that Gholam Russool accordingly did file a petition withdrawing the suit and a deed of quit-tance, and alleged that the plaintiff had signed them. These two papers were presented before the late principal sudder ameen, but were not filed on account of an objection, with reference to the costs due to Government. The money and the two papers are still with Moonshee Gholam Russool. Under these circumstances, it is proper that Gholam Russool pay the money (rupees 425) to plaintiff, and that the defendant, Rampurshad, pay the costs of plaintiff: the defendants will pay their own costs. Ordered accordingly.'

From this award the defendant appeals; and the plaintiff, in her answer, also expresses some dissatisfaction with it.

It appears that plaintiff became entitled to certain property on the death of Kulundur Singh. Being unable to manage her affairs herself, she gave a general power of attorney to the defendant, Rampurshad, to look after and realize this property, which he did, but did not account for it to the plaintiff. The present suit is brought against the defendant to force him to account for that property. The case, however, was adjusted between the parties before the principal sudder ameen,—rupees 425 being lodged with a third person, and made payable to plaintiff on her withdrawing her action. She accordingly did present a petition withdrawing her action, but the late principal sudder ameen made some objections to it, and would not file it. The present principal sudder ameen has very properly caused it to be filed, and makes it the basis of his decision. The appellant's objection now is, to the award of costs against him. I see no reason to doubt the propriety of this order; the conduct of the defendant in refusing to account for his receipts to his employer admits of no defence. The adjustment between the parties contained no mention of costs; the court is, therefore, at liberty to lay them on the party in the wrong, viz. the defendant. I affirm the principal sudder ameen's decision; the whole of the costs of appeal to be paid by the defendant, Rampurshad.

THE 4TH MAY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 817 OF 1847.

IN the matter of the petition of Durp Raee, filed in this Court on the 25th November 1847, praying for the admission of a special appeal from the decision of the principal assistant commissioner of Durung in Assam, under date the 4th September 1847 ; reversing that of the moonsiff of Durung, under date 15th December 1846, in the case of the petitioner, plaintiff, *versus* Mohaja Bibi and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff sued to recover the value of certain jewels given to a woman preliminary to a marriage with her, after the receipt of which she joined herself to another man ; and obtained a partial verdict in his favor from the moonsiff.

The principal assistant reversed the decision of the moonsiff, on the ground that jewels once given to a woman become her *stridhun*, and are not recoverable by suit at law.

The plaintiff states in his petition to the Court, that the decision of the principal assistant is contrary to the constant practice of the provinces of Assam. Evidence as to the practice, if necessary, should have been taken, and the case should not have been decided upon a mere point of Hindu law, without its being recorded that the Hindu law is generally recognized in Assam as governing such cases.

Considering the decree of the principal assistant to be incomplete, I remand the case to the principal assistant under Clause 2, Section 2, Regulation 9, 1831, to be tried *de novo*, with reference to the foregoing remarks.

THE 4TH MAY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 83 OF 1848.

IN the matter of the petition of Domun Shah, filed in this Court on the 27th March 1848, praying for the admission of a special appeal from the decision of Mr. A. Smelt, judge of East Burdwan, under date the 30th December 1847 ; affirming that of the moonsiff of Burdwan, under date 17th November 1846, in the case of Domun Shah, plaintiff, *versus* Mrs. Thomick, defendant.

It is hereby certified that the said application is granted on the following grounds.

This case was remanded to the judge, on the 15th July 1847, as per proceeding of this Court to the following effect :—

“The plaintiff sued to compel the defendant to open a drain and pathway from his house, which she had closed. The moonsiff and judge decided against him. The latter authority thus records his opinion.

‘The moonsiff having proceeded in person to examine into the merits of the case, gave his judgment against the plaintiff. It appears from the proceedings held before the moonsiff that the drain and pathway were entirely of a private character, and both were a nuisance to the (defendant) respondent. A drain and pathway had existed no doubt; but as they were not of right, but by sufferance, and now being a great inconvenience to the defendant, she had stopped them. I see no reason whatever to interfere with the moonsiff’s decision, and uphold it, dismissing the appeal with costs.’

“The judge’s decree is incomplete. The right to stop a drain and pathway must be very clearly made out, ere it can be admitted. Now, it appears incidentally in the proceedings, that the defendant has become proprietress of the property near the drain and pathway at a recent date, and the judge himself says ‘a drain and pathway had existed no doubt.’ The period for which the drain and pathway have been in existence, and the exact date of the defendant’s entering upon possession of the property, are essential to the right determination of this case. Both of these are wanting in the judge’s decree.”

The judge has again decided the case, and the following is his decree :—

‘This case was disposed of by me on the 18th March last, but returned for further enquiry under the orders of the Sudder Dewanny Adawlut dated the 15th July 1847. Having repaired to the spot in person on the 7th December, I can see no reason whatever to differ from my former decision. The drain in question is a perfect nuisance to the defendant (respondent) who purchased the ground upwards of ten years ago; for it allows the appellant to rid his premises of all the filth and dirt therein through this drain into the respondent’s compound. The pathway has been shut up for some years, and has not been used for a long time, and the drain has existed for several years. Both must be most annoying to the respondent; and I have no hesitation in confirming the moonsiff’s decision and dismissing the appeal.’

The judge’s last decision is as unsatisfactory as his first. He was told to ascertain the period for which the drain and pathway have been in existence, and the exact date of the defendant’s

entering upon possession of the property. He now says 'the pathway has been shut up for some years, and has not been used for a long time, and the drain has existed for several years.' Here is nothing precise; and as for the date of the defendant's entering upon possession of the property, it is not so much as alluded to.

I admit the appeal, and remand the case, in order that the orders of this Court may be fully carried out.

THE 4TH MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 86 OF 1848.

IN the matter of the petition of Mohunt Rampurshad Gosain, filed in this Court on the 28th March 1848, praying for the admission of a special appeal from the decision of the principal sudder ameen of Purneah, under date the 6th January 1848; reversing that of the moonsiff of Purneah, under date 13th March 1847, in the case of Hurdenath Misr, plaintiff, *versus* Mohunt Rampurshad Gosain, defendant.

It is hereby certified that the said application is granted on the following grounds.

This was an action to recover a sum of money on a bond, to which the defendant pleaded an evasion by the plaintiff of the interest laws, by deductions from the principal and by charging usurious interest.

The moonsiff, considering the evasion proved, dismissed the claim.

In appeal the principal sudder ameen reversed the decree of the moonsiff, observing that the bond did not show any attempt at an evasion of the interest laws. He takes little or no notice of the evidence of the witnesses, who, it appears from the moonsiff's decree, were the writers of, and subscribing witnesses to the bond. His rejection of this evidence must be accounted for. I admit the appeal, as the case, judging from the principal sudder ameen's decree, has been decided without any sufficient investigation of its merits. The principal sudder ameen will try it *de novo*. He will record whether the witnesses examined attested the bond or not; he will state the substance of their evidence, and give his reasons for admitting or rejecting it.

THE 4TH MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 221 OF 1846.

IN the matter of the petition of Rampurshad Chowdhree, filed in this Court on the 9th May 1846, praying for the admission of a special appeal from the decision of Niamut Ali Khan, principal sudder ameen of Tirhoot, under date the 5th February 1846; affirming that of Muneerooddeen Hosein, moonsiff of Mahowa, under date 13th June 1845, in the case of Sheikh Tegh Ali, plaintiff, *versus* Rampurshad Chowdhree, defendant.

It is hereby certified that the said application is granted on the following grounds.

This was an action instituted by the plaintiff to obtain redemption of a mortgage, on the ground that the mortgage bond was executed by the father of the plaintiff during the minority of the latter, the property having descended to him through his mother.

The defendant pleaded the perfect legality of the transaction under the circumstances of the case.

The moonsiff gave judgment for the plaintiff, and his decision was confirmed in appeal by the principal sudder ameen, on the ground that a guardian is incompetent, under any circumstances, to alienate the immovable property of his ward.

This is a question of Mahomedan law, which should have been referred to the law officer, the more especially as Macnaghten lays it down in his work on Mahomedan law (pages 63 and 64,) that a guardian may sell the immovable property of his ward under certain circumstances.

I admit the appeal, and remand the case to the principal sudder ameen. He will submit the question for the consideration of the zillah law officer; and, should his opinion be in favor of the guardian's power to sell, he will then take into consideration whether, under the circumstances, the conditional sale was justifiable, stating his reasons fully for the decision at which he may arrive.

THE 5TH MAY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 794 OF 1847.

IN the matter of the petition of Mogul Chand Baroa, filed in this Court on the 27th December 1847, praying for the admission of a special appeal from the decision of Ashruf Ali Khan, principal sudder ameen of Chittagong, under date the 14th September 1847; altering that of the moonsiff of Israpore, under date 7th November 1846, in the case of Mogul Chand Baroa, plaintiff, *versus* Mohumud Ameen and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff sued to recover possession of certain lands, which he held at an annual rent of 24 rupees, as per a *solehnameh*, or deed of compromise executed between the same parties, and a decree of court by which that deed was upheld; alleging that the *talookdar* (defendant) had since then, and without his consent, entered into fresh engagements for the greater part of the lands with his (plaintiff's) son, by which he was ejected.

The moonsiff gave judgment for the plaintiff, taking as the basis of his decision the *solehnameh* abovementioned, and making local enquiries to ascertain the extent of the land in plaintiff's possession, and the extent to which he was entitled to recover possession.

The principal sudder ameen modifies the decree of the moonsiff, observing that while the *solehnameh* is specific as to the extent of one kind of land, it is not specific as to the rest, that is the waste and *beeta* land. He takes into account the quantity in the possession of the plaintiff and his son, and finding that to be something deficient from the quantity *specifically* mentioned in the *solehnameh*, he makes up that quantity by decreeing the deficiency. The principal sudder ameen has omitted to notice the allegation of the plaintiff, that by the fresh engagement with his son, against his consent, the *solehnameh* and former decree of court have been superseded, and that he has been ejected in consequence. As the plaintiff made his son a party to the suit, this point should have been investigated. I accordingly admit the appeal, and remand the case, in order that the principal sudder ameen may consider the above point, decide whether the fresh engagement can stand; and, if it be held that it cannot, then proceed to state the extent and kinds of land of which the plaintiff is entitled to obtain possession.

THE 6TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 150 OF 1847.

Special Appeal from a decision passed by the Judge of Zillah Bhagulpore, June 9th, 1845 ; affirming a decree passed by the Principal Sudder Ameen of that district, February 28th, 1845.

SITABEE LAL KULLA AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

RAJAH BIDANUND SINGH, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Pursun Komar Thakur.

Respondent—Defaulting.

THIS case was admitted to special appeal, on the 9th February 1847, under the following certificate recorded by Mr. C. Tucker:—

‘ In this case the plaintiff, purchaser at public sale, sued the petitioners (defendants,) summarily before the collector, under Regulation 7, 1799, for balance of rent due on a *hustabood*, or readjustment of assessment by measurement. No notice was served under Section 9, Regulation 5, 1812, and the suit being further inadmissible under Section 10, Regulation 8, 1831, it was dismissed by the collector. The present suit was brought to cancel the collector’s decision, and the decrees of the lower courts are to that effect.

‘ Special appeal admitted under the precedent formed in the case Kallee Purshad Pandey and others, *versus* Rajah Bidanund Singh, (No. 123 of 1845,) decided on 23d November 1846, Present: Messrs. Rattray and Tucker, and Sir R. Barlow, (vide page 391, printed reports for November 1846.)’

Under the circumstances recorded in the certificate, and adhering to the precedent quoted therein, we annul the decisions of the lower courts and decree for the appellants, affirming the summary decision of the collector, with all costs in the three courts chargeable to the respondent, who did not appear in this Court.

THE 6TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 151 of 1847.

*Special Appeal from a decision passed by the Judge of Zillah Bhau-
gulpore, June 9th, 1845 ; affirming a decree passed by the Prin-
cipal Sudder Ameen, February 28th, 1845.*

SETABEE LAL KULLA AND OTHERS, APPELLANTS,

(DEFENDANTS,)

versus

RAJAH BIDANUND SINGH, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Pursun Komar Thakur.

Respondent—Defaulting.

THIS is a suit of precisely the same nature as the foregoing (No. 150), and the same order is passed.

THE 6TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 152 of 1847.

*Special Appeal from a decision passed by the Judge of Zillah Bha-
gulpore, June 9th, 1845 ; affirming a decree passed by the Prin-
cipal Sudder Ameen of that district, February 28th, 1845.*

PIRBHOORAM PANDAY, APPELLANT, (DEFENDANT,)

versus

RAJAH BIDANUND SINGH, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—H. P. Marshall.

Respondent—Defaulting.

THIS is a suit of precisely the same nature as the preceding (No. 150), and the same order is passed.

THE 6TH MAY 1846.

PRESENT:

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 28 OF 1846.

Special Appeal from a decision passed by H. Swetenham, Esq., Officiating Judge of the 24-Pergunnahs, July 15th, 1844; affirming a decree passed by the Moonsiff of Sulkea, April 15th, 1844.

BHOLANATH BOSE, APPELLANT, (DEFENDANT, WITH
RAM DHUN MALICK,)

versus

MUSST. BHAGABUTTEE AND SHEEBOO, RESPONDENTS,
(PLAINTIFFS.)

Wukeel of Appellant—Shibnurain Chatterjee.

Wukeel of Respondents—Kishen Kishore Ghose.

THIS case was admitted to special appeal, on the 20th January 1846, under the following certificate recorded by Mr. C. Tucker:—

‘The defendant, Ram Dhun Malick, attached the property of the plaintiffs for an alleged balance of rent; and, following up the same, the property was on the eve of being sold when the plaintiffs paid in the amount, protesting the demand to be unjust, and immediately instituted the present suit. Bholanath Bose was made a defendant on the ground that he was the instigator of the whole, and that Ram Dhun Malick was a fictitious person.

‘Ram Dhun Malick however appeared and defended the suit, as did Bholanath Bose. The moonsiff decreed for plaintiffs double the amount unjustly levied, with costs, against both defendants, which decision was affirmed by the acting judge.’

‘From this decision Bholanath Bose prefers this special appeal, on the ground that he had nothing to do with the case, and that no action could lie against him.

‘I am not aware that a case of this nature has ever been decided in this Court; and, I confess, I doubt whether an action would lie in such a case, and I admit the special appeal to try that point.’

We find it distinctly stated in the decision of the moonsiff, which was affirmed by the judge in appeal, that the participation of Bholanath Bose in the proceedings which led to this suit was fully established, and that the whole case was founded on falsehood, no engagements having ever been entered into between the

defendant and either of the plaintiffs. Under these circumstances, we are of opinion the action was properly brought, and dismiss the appeal with costs.

THE 6TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 51 OF 1847.

Special Appeal from a decision passed by W. H. Martin, Esq., Additional Judge of Zillah Hooghly, December 13th, 1844; affirming a decree passed by Edward Stirling, Esq., Collector of that District, August 6th, 1842.

JOYKISHEN MOOKERJEE AND RAJKISHEN MOOKERJEE, ON THE PART OF THEIR BROTHER BEJOYKISHEN MOOKERJEE, A MINOR, APPELLANTS, (PLAINTIFFS),

versus

**MOSAHEB KHAN AND OTHERS, RESPONDENTS,
(DEFENDANTS.)**

Wukeels of Appellants—Ramapurshad Raee and Sibnurain Chatterjee.

Wukeel of Respondents—Moonshee Uzmutoolah.

THIS case was admitted to special appeal, on the 28th November 1846, under the following certificate recorded by Messrs. C. Tucker and J. F. M. Reid, and Sir R. Barlow:—

‘The petitioners (appellants) sued under Regulation 2, 1819, to resume 5 *biggahs* and 3 *cottahs* of land held by the defendant, Mosaheb Khan.’ This was ancestral property; and by a decree previously passed, in which Mosaheb Khan was plaintiff *versus* Buktaour Khan, it was established that Mosaheb Khan was entitled to only a 1 *anna*, 12 *gundahs*’ share of the family rent free-land, notwithstanding which the collector and additional judge exempted the entire quantity of lands from assessment.

‘Special appeal admitted to try whether the former decree was not binding on the lower courts, so as to bar Mosaheb Khan’s right to any thing more than his declared share in the family *lakhiraj* lands.’

On referring to the petition of plaint, we find that the plaintiffs sue, not so much to resume, as to recover the disputed land; alleging that it belongs to their *mdl* property, and is held by the defendants without payment of rent for it.

The defendants plead that the land is their *lakhiraj* property, covered by grants made to their ancestors. The plaintiffs reply that the land now sued for is independent of, and additional to the land covered by the grants.

The collector and additional judge find that the land sued for is identical with that covered by the grants.

The ancestral property amounts to 6 *biggahs*; and a former decree of court declares the share of Hyder Khan, the father of Mosaheb Khan, the present defendant, to be only 1 *anna*, 12 *gundahs*. If then Moosaheb Khan is entitled only to a portion not exceeding 1 *anna*, 12 *gundahs* of 6 *biggahs*, it is not easy to conceive how he is in possession of upwards of 5 *biggahs*, and the whole of this to be covered by the grants; unless, indeed, the other share-holders have transferred their shares to him, which is no where shown; but, on the contrary, it appears that some of the other share-holders have sold their shares to other parties. As this inconsistency between the two decrees has not been cleared up, the investigation appears to us incomplete; and we accordingly remand the case to the zillah judge that it may be tried *de novo*, with reference to the foregoing remarks.

THE 6TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 270 OF 1846.

Special Appeal from a decision passed by Mr. W. S. Alexander, Judge of Shahabad, August 26th, 1844; amending a decree passed by Moulvee Mohummud Hosein, Sudder Ameen, March 14th, 1844.

MR. JAMES TOTH, APPELLANT, (DEFENDANT, WITH OTHERS,) *versus*

MR. C. T. TAYLER, RESPONDENT, (PLAINTIFF.)

THIS case was admitted to special appeal, on the 13th June 1846, under the following certificate recorded by Messrs. C. Tucker and J. F. M. Reid, and Sir R. Barlow:—

‘The plaintiff sued to recover possession of two boats, value 200 rupees, and rupees 505-2-6 damages for the detention thereof by Mr. Toth. The sudder ameen decreed the restoration of the boats, but rejected the claim for damages. The judge confirmed that part of the decree which awarded the restoration of the boats; and, in part of the damages claimed by the plaintiff, awarded 200 rupees. As the judge acknowledges that the plaintiff had adduced no evidence whatever in support of the amount of damages, and as the sum awarded is purely arbitrary, the special appeal is admitted to try the question of the propriety of awarding any damages under such circumstances, and, if any, to what amount.’

The appellant in this case appointed Meer Buhadur Ali his *wukeel*; that individual has resigned his office, and a notice to that effect was served under Section 18, Regulation 27, 1814, requiring the appellant to appear by another pleader. The service of the notice is dated 31st January last, and the time therefore allowed by Clause 3 of the above Section expired on the 30th April. As the appellant has not appeared in any way, we strike off the case on default.

THE 6TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 454 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Hooghly, December 24th, 1845; reversing a decree passed by the Moonsiff of Keerpooy, September 16th, 1845.

PERTABNURAIN RAE, APPELLANT, (PLAINTIFF,)

versus

MUCKOO BIBI AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Ramapurshad Rae.

Wukeel of Respondents—Gour Hurree Banerjee.

THIS case was admitted to special appeal, on the 13th July 1847, under the following certificate recorded by Mr. C. Tucker:—

‘The petitioner (appellant) who holds a *moocurruree jumma* under the defendant, Muckoo Bibi, instituted this suit to set aside a sale made by the said Muckoo Bibi of his *moocurruree*, on account of a balance of rent for the year 1247 B.; the zemindar

having no authority to make such sale, which ought to have been made by the collector under Clause 7, Section 15, Regulation 7, 1799, and Act 8 of 1835.

‘The moonsiff decreed for the plaintiff; but, on appeal, the principal sudder ameen reversed his decision and confirmed the sale.’

‘A special appeal was admitted by me on the 19th March 1844 in a similar case, which was decided by a full bench on 9th July 1846, cancelling the sale. I therefore admit the special appeal in this case also, for the same purpose.’

The sale by the zemindar is palpably illegal; and, adhering to the precedent quoted in the certificate, we annul the decision of the principal sudder ameen, and decree for the appellant, cancelling the sale. Costs in all three courts chargeable to the respondents.

THE 6TH MAY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 275 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Purneah, Rooknoodeen Khan, April 27th, 1847.

**BABOO CHINTAMUN SINGH, BABOO RAMA SINGH
AND OTHERS, APPELLANTS, (DEFENDANTS,)**

versus

**RAJAH BEJYE GOVIND SINGH, RAJAH RAJINDUR
SINGH, NURAIN RAEE, AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)**

Wukeels of Appellants—J. G. Waller and Gholam Sufdur.

Wukeels of Respondents—Pursun Komar Thakur and E. Colebrooke.

THIS suit was instituted by respondents, on the 26th December 1844, to recover from appellants possession of the estate of Holas, and other villages, in virtue of a decree for 2,500 *biggahs* of land passed in the zillah court on the 28th July 1801, and affirmed in the provincial court of Patna on the 30th August 1802; and for possession of 7,485 *biggahs*, 9 *biswahs* from which respondents were ousted in 1212 and have so remained to 1251 *Fuslee*; with

mesne profits on the whole of the lands during the period of dispossession. Estimate (for stamp) Company's rupees 12,99,754-13-4.

The decree of 1801 was in favor of Ranees Indrawuttee, ancestor of respondents, against Mohun Singh, father of the two named appellants, and relation of the others. The dispossession of 1212 F. was by Mohun Singh, perpetuated to 1251 by appellants.

The principal sudder ameen did not deem these separate claims to be cognizable by the courts in one and the same suit, and passed an order of nonsuit; and against this both parties have appealed. The plaintiffs pray a judgment in their favor on the merits of the case; and the defendants seek a final dismissal of the claims preferred, on, amongst other grounds, the date of the cause of action in each particular instance, with reference to which they maintain that neither claim is cognizable under the law of limitation.

It is to be regretted that the case cannot be finally disposed of, as desired; but under the law and practice of the courts, this is impossible: and I affirm the order of nonsuit appealed against; the parties paying their own costs respectively.

THE 8TH MAY 1848.

PRESENT:

R. H. RATTRAY and

A. DICK, ESQRS.,

JUDGES,

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 220 of 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, Niamut Ali Khan, February 3d, 1847.

GOVERNMENT, APPELLANT, (DEFENDANT,)

versus

MUSST. IMAMBANDEE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Thakur.

Wukeel of Respondent—Ameer Ali.

THE suit out of which this appeal arose was instituted by respondent on the 9th December 1843. It was against Musst. Burkut-o-nissa; and the claim was for possession of certain lands, with mesne profits, estimated at 3,30,468 rupees.

By a supplementary plaint, Government was made a defendant in the case ; but, on an explanatory answer being filed, the plaint was withdrawn, and Government had no further connexion with the proceedings.*

The principal sudder ameen charges plaintiff in the case with half the full costs due to the Government *wukeel* ; but, in the account appended to his decision, he makes the remaining moiety payable by Government, and it is against this order that the present appeal has been preferred.

We are of opinion that the whole of the costs of court on the part of Government, viz. 2 rupees, should be paid by the plaintiff. Of the fees of the Government *wukeel*, we think that the half (500 rupees) of the full legal fees of 1,000 rupees, declared by the principal sudder ameen to be payable by the plaintiff, is all that the Government *wukeel* is entitled to receive ; and we order that the plaintiff pay rupees 502 as costs on the part of Government. The remaining 500 rupees are not claimable, or due, by either party.

THE 8TH MAY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 87 OF 1848.

IN the matter of the petition of Hurdoorga Chowdhraïn, filed in this Court on the 28th March 1848, praying for the admission of a special appeal from the decision of Syud Abas Ali Khan, principal sudder ameen of Dacca, under date the 29th December 1847 ; modifying that of the moonsiff of Nusragunge under date 30th December 1844, in the case of Byjenath Bhoomik and others, plaintiffs, *versus* the petitioner and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiffs sued to obtain redemption of their estate, alleged to have been mortgaged to the defendants, the loan having been paid off.

The defendants admitted that the property was at first conditionally sold to them by the plaintiff's ancestor ; but that, on their serving the notice prescribed by Section 8, Regulation 17, 1806, Musst. Jymunnee, the widow of the mortgager, absolutely transferred the property to them, and gave them possession.

The lower courts both rejected the plea of absolute conveyance. The moonsiff gave judgment for the plaintiffs, directing that they were to obtain possession on the small balance, which he still considered to be due, being paid off by the usufruct.

The principal sudder ameen says, it is not clear whether Musst. Jyemunnee, when she made over possession, was, or was not, a minor, and records his opinion that this point should have been enquired into. He however makes no enquiry; but coming to the conclusion that the mortgagees had improperly obtained possession, passes a decree in favor of the plaintiffs, awarding possession to them at once. I consider this decree to be incomplete. The principal sudder ameen should have gone fully into the circumstances under which the mortgagees came into possession, ere he passed such an order. I admit the appeal; and remand the case, in order that the principal sudder ameen may enquire into the point raised by himself, and also into the other circumstances under which the mortgagees obtained possession of the property. Having made this enquiry, he will then record his opinion as to whether that possession can be maintained, or not; and decide the case accordingly.

THE 8TH MAY 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 91 OF 1848.

IN the matter of the petition of Prankishen Mookerjee, filed in this Court on the 29th March 1848, praying for the admission of a special appeal from the decision R. Torrens Esq., judge of 24-Pergunnahs, under date 31st December 1847; modifying that of the principal sudder ameen of 24-Pergunnahs under date 12th December 1846, in the case of Ishur Chundur Das and others, plaintiffs, *versus* the petitioner and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The particulars of this case are given at page 241 of the decisions of the judge of zillah 24-Pergunnahs, during the year 1847.

The present is no appeal upon the merits of the case; but the petitioner complains that though exempted from all liability in regard to the claims of the plaintiffs, he has been ordered by the zillah judge to pay his own costs, which he contends should, under the circumstances of the case, have been charged to the plaintiffs.

As the judge's decree contains no reason for saddling the petitioner with his costs, I admit the appeal. The judge, if he still considers the petitioner liable for the costs charged to him, will state his reasons for the same, in order that this Court may, in the event of another application to it, have the grounds of his order before it. This order affects no other part of the judge's decree, than that respecting the costs charged to the petitioner.

THE 9TH MAY 1848.

PRESENT:

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 106 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, December 5th, 1846.

R. H. SCANLAN AND ANOTHER, APPELLANTS, (DEFENDANTS,)

versus

THE SALT AGENT OF THE 24-PERGUNNAHS, RESPONDENT,
(PLAINTIFF,)

*Wukeel of Appellants—A. Imlach.**Wukeel of Respondents—Pursun Komar Thakur.*

CLAIM rupees 6,960, on account of advances for supply of salt.

The salt agent claimed the sum mentioned from the defendants, on account of money actually advanced to the defendants, on receiving which they agreed by written contract to supply 16,000 *maunds* of salt. The sum advanced was rupees..... 6,750

The value of the salt supplied 638½ *maunds*, with expenses of transfer, was 507

Remainder,.....	6,243
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Add interest,	717
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Total due from defendants,	Rs. 6,960
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The defendants admitted the receipt of the advance and the contract to supply salt (in fact the receipt and the written contract are on the record); but alleged that the salt which they were to supply was to be manufactured in the Anundpore grant, in the Sunderbuns. That this grant contained 31,000 *biggahs* of land; and that they had been dispossessed of 1,454 *biggahs* of this land by certain *molungees*. That they considered themselves entitled to set off the losses which had ensued from this dispossession, against the sum due to Government on account of the advances.

On the 5th December 1846, the principal sudder ameen gave an award in favor of the plaintiff, observing that the dispossession by the *molungees* had nothing whatever to do with the contract with the Government.

From this award the defendants appeal.

This is an action on a simple contract, to supply salt in consideration of advances made in money. The terms of the contract do not specify that the salt is to be manufactured in Anundpore grant. The circumstance of the defendants having

been deprived of a portion of the grant, cannot, therefore, vitiate the contract. In the 11th Clause of that document, I find the defendants agree 'to refund all the money received in advance, for which they do not deliver an equivalent in salt, one month after the close of the manufacture of the year 1250.' The claim of the salt agent is therefore strictly in accordance with the terms of the contract. The defence and appeal of the defendants appear to be of a most litigious and unfounded nature. There is no proof that they have been deprived of any portion of the grant; nor if they were, that they were so deprived by the Government; and even if the contract were vitiated, the money advanced must be returned. But these defendants maintain their right to retain the money advanced to them, notwithstanding they have not supplied the salt, a plea which is perfectly preposterous.

ORDERED,

That the decision of the principal sudder ameen be affirmed : costs against appellant.

THE 9TH MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION NO. 103 OF 1848.

IN the matter of the petition of Shamanund Dey, filed in this Court on the 6th April 1848, praying for the admission of a special appeal from the decision of the principal sudder ameen of zillah Cuttack, under date the 21st December 1847; reversing that of the sudder ameen of Balasore, under date 22d June 1846, in the case of Shamanund Dey, plaintiff, *versus* Bipperchurn Bugdoe and others, defendants.

The petitioner sued for some alluvial land, which had formed and joined itself to his estate. The defendant claimed the land as appertaining to his estate.

The sudder ameen went to the spot; and, finding the plaintiff's statement to be correct, decreed in his favor. On appeal, the principal sudder ameen deputed an *ameen* to make a map of the disputed land, and surrounding country. According to this map, the disputed land adjoins the petitioner's village Irrum,—the defendants' estate being situated south thereof, and having a portion of the said alluvial land in front thereof. But the principal sudder ameen makes no mention of this map in his decision; and though admitting that the disputed land partially bounds the plaintiff's village of Irrum, he dismisses his claim, asserting the defendants' estates to lie west of the plaintiff's. This again is opposed to the map filed; and, even were it true, would not affect the present

case. The river runs north and south: the alluvial land is on the east bank; and both plaintiff's and defendants' estates also on the east bank, the defendants' lying south of the plaintiffs.

It is obvious the case has been very superficially investigated by the principal sudder ameen. I therefore admit the special appeal, and remand the proceedings for further consideration. The principal sudder ameen will, if he reject the map prepared by the *ameen* and filed in the case, record his reasons for so doing.

THE 9TH MAY 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 289 OF 1844.

Regular Appeals from the decision of the Principal Sudder Ameen of Zillah Rajshahye, Abdool Ali.

HOOKEUM CHUND BEYHANEE, APPELLANT,

(DEFENDANT,).

versus

MESSRS. FRENCH, HODGES AND CO., RESPONDENTS,
(PLAINTIFFS,)

Wukeel of Appellant—Sree Ram Raee.

Wukeel of Respondents—A. Imlach.

APPEAL laid at 437 Company's rupees, 12 annas costs of suit decreed against appellant liberated from claim.

CASE No. 290 OF 1844.

GUNESH PURSHAD BEYHANEE, APPELLANT, (DEFENDANT,)

versus

MESSRS. FRENCH, HODGES AND CO., RESPONDENTS,
(PLAINTIFFS,)

Wukeel of Appellant—Sree Ram Raee.

Wukeel of Respondents—A. Imlach.

SUIT laid at 14,077 Company's rupees, 9 annas, 2 pie, on account of balance due as per *hath khata*, or banker's cheque book.

Both these appeals are from the same decision, which decreed the claim of 14,077 Company's rupees, 9 annas, 2 pie, preferred by Messrs. French, Hodges and Co., against the banking house of the appellant, Gunesh Purshad Beyhanee, a minor, in the name of his guardians; liberating the appellant, Hookum Chund, from the claim, but saddling him with his costs.

The claim rested on the allegation, that one Poorun Mull, together with Gunga Purshad Beyhanee and Rughonath, defendants, were three guardians of the minor, Gunesh Purshad, and conducted, each, one of his three banking establishments, or houses of business. That Poorun Mull conducted that at Sahibgunge, with which plaintiffs had money transactions; that by the *hath khata* filed, duly balanced and signed by Poorun Mull, the sum claimed was due to plaintiffs; that Poorun Mull had died, and that since then the other two guardians managed the establishment at Sahibgunge, and consequently were liable.

The defence rested on the plea, that the signature of one guardian was insufficient to render the minor liable; and denied the monied transactions altogether, on account of the minor.

There is no proof on record that Poorun Mull was legally appointed the guardian of the minor; nor, indeed, that the other two named were legally appointed guardians, for a mere compromise between them and a *gomashtah*, or agent, of the minor's father, cannot render the minor liable for their acts; although on such a compromise (*solehnameh*) a suit between the alleged guardians and the *gomashtah* may be decided in a court of justice, because it may be a collusive suit for the purpose of obtaining such a decision. But if it be proved that the three were legally the guardians of the minor, there is no proof filed that they each, separately, manage three distinct houses and Poorun Mull alone that at Sahibgunge. Further, there is no proof adduced by plaintiffs, that they deposited cash or gave drafts on Calcutta to the Sahibgunge house of the minor, save the *hath khata* filed, which too has not been proved by the official writer of the *kothee*, or house.

The two cases are therefore remanded for proofs on the several points above indicated to be required from plaintiffs, and in refutation thereof evidence from defendants; and then decision to be passed.

• With respect to the appeal No. 289, the judge will award the costs of the party liberated to be paid by the party who may have wantonly forced the other into court.

THE 10TH May 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 490 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, Mouzum Hussun Khan, June 9th, 1847.

BYRUM SINGH, APPELLANT, (PLAINTIFF,)

versus

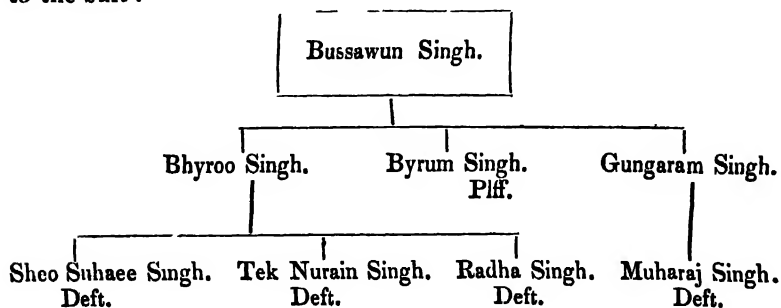
SHEO SUHAE SINGH, TEK NURAIN SINGH, RADHA SINGH, AND MUHARAJ SINGH, RESPONDENTS,
(DEFENDANTS.)

Wukeels of Appellant—Pursun Komar Thakur and Bunsee-buddun Mitr.

Wukeels of Respondents—None, and not present in person.

THIS suit was instituted by appellant, on the 26th May 1846, to recover from respondents possession of two-thirds of *mouzah* Hurreehur—Bikrampore, with mesne profits from 1242 to 1253 *Fuslee*: estimate (for stamp) Company's rupees 19,284-3-6.

The following table shows the relationship between the parties to the suit :—



On the 30th September 1833, a decree was passed against Byrum Singh in favor of Gungaram Singh, and the three sons of Bhyroo Singh in the zillah court, by which, amongst other lands, two-thirds of Hurreehur—Bikrampore were adjudged to the latter, as descendants and heirs of the common ancestor, Bussawun Singh. Hulpore, Hingoo and other villages, portions

of which had been claimed, were excepted, and maintained as the sole property of Byrum Singh on the ground of his having become possessed of them subsequently to the year 1235 F., when he separated from his family, and all joint interests and responsibilities ceased between them.

On the 5th April 1835, the above judgment was affirmed in the Sudder Court: the decree had already been executed; nothing had been urged impugning it on the score of mistake or oversight; when, in 1846, eleven years after the appeal decision, this action was brought to recover Hurreehur—Bikrampore, on the plea (before rejected) of there being proof of its having formed a portion of those lands which were specially excepted from the decrees of 1833 and 1835, as having been obtained by Byrum Singh after the year of separation above mentioned (1235 F.)

The principal sudder ameen dismissed the claim as groundless and vexatious, and fined the plaintiff (under Section 12, Regulation 3, of 1793) for bringing it; and I affirm the decision with all costs chargeable to appellant.

THE 10TH MAY 1848.

PRESENT:

A. DICK, Esq.

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 21 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Runypore, Oopundur Chundur Nyaruttun.

RAM MUNEE DASEE, APPELLANT, (DEFENDANT),

versus

RAS MOHUN DAS CHOWDHREE, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Sree Ram Raee.

Wukeel of Respondent—Ramapurshad Raee.

SUIT laid at 8,478 rupees, 6 annas, 6 pie to annul a deed of sale to defendant, and declare valid a deed of sale to plaintiff, in

which the property of the former is included ; and to put plaintiff into possession accordingly.

The property in dispute consists of certain rent-free *devuttur* lands, which belonged to one Ramkanth. He sold a portion of it to appellant for 999 Company's rupees on the 26th *Poos* 1245 B. *Æ.*, and put her into possession of her purchase, except a small portion. She therefore sued him ; and, being nonsuited before the principal sudder ameen, appealed to the judge. During the pending of the appeal, respondent appeared for the first time and objected, claiming right and alleging possession on the whole of the *devuttur* lands, in virtue of a deed of sale from the said Ramkanth for 4,419 Company's rupees, 11 *annas*, dated 24th *Magh* 1245 B. *Æ.*, and registered 1st *Phalgun* 1245 B. *Æ.*, or 11th February 1839. As he had not objected in the court of first instance, he was referred to a regular suit. The appellant's claim was investigated, and a decree passed in her favor, and possession on the small portion of her purchase given. The respondent therefore instituted this suit, simply to annul appellant's deed of purchase, and declare his own valid ; laying his suit at 3,978 *Sicca* rupees, or 4,239 Company's rupees, 3 *annas*, 3 *pie*, eighteen times the annual rental of appellant's purchase.

In a supplemental plaint, he laid his suit at 8,478 Company's rupees, eighteen times the annual rental of his own purchase ; and prayed to be put into possession of his purchase, as well as to annul appellant's purchase, and declare valid his own.

The principal sudder ameen, for reasons set forth in his decision, not only annulled appellant's purchase and declared valid respondent's, but ordered possession on the whole of the two purchases to be given to respondent.

The plaintiff, in his plaint, throughout asserts his possession on the whole of his purchase, from the time of purchase ; and urges it as a conclusive argument of the fictitious purchase of defendant, which he prays may be declared null and void. Therefore, his supplemental plaint, praying for possession of his purchase, is no rectification of an error, but a new subject of suit in utter contradiction of the whole tenor of his original plaint.

The principal sudder ameen ought forthwith to have nonsuited him.

The decision of the principal sudder ameen is reversed, and the claim of plaintiff is nonsuited. Costs of both courts in full awarded against plaintiff (respondent.)

THE 11TH MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 103 OF 1839.

Review of judgment passed in the above case of regular appeal, in favor of Respondent, by Messrs. Tucker, Reid and Jackson.

MR. J. P. WISE, (APPELLANT,) PLAINTIFF,

versus

RAJKISHEN CHUCKERBUTTEE, (RESPONDENT,)

DEFENDANT.

Wukeel of Appellant—Ameer Ali.

Respondent—Absent in appeal.

THIS case was originally decided by the Court on 17th June 1846. The fact that one Sheo Ram appears in the bond as the lender of the money, and not the husband of the party who sold it to the plaintiff, was noticed by the Court. The irregularity however of not bringing Sheo Ram, or his representative, into the court of first instance did not lead to an order of nonsuit; but the suit was dismissed on the ground that the plaintiff had not proved the transfer to himself of the bond on which he sues. The review has been admitted on the application of the plaintiff, on the ground that he is prepared to prove the transfer, such proof having been considered by him on the first trial to have been unnecessary, as that point was not questioned by the defendant.

The point of irregularity above noticed, having been apparently passed over when the case was first before the Court, the order having been one of dismissal and not of nonsuit, the Court deem it proper to confine themselves to the merits of the case on the present occasion.

There is evidence to prove that the lender of the money was Kalee Das, and plaintiff has now filed the deed of sale dated 19th Bysakh 1242 B. S., executed to him by Musst. Birjishoree together with a copy of a decree of court in a suit instituted by the same plaintiff, in which the deed of sale was filed and proved. The chain of evidence to shew that the plaintiff is the party entitled to recover upon the bond executed by Bhowanee Churn Chuckerbuttee, is therefore complete. There is also evidence upon the record to shew that the defendant has succeeded to the property of Bhowanee Churn Chuckerbuttee.

We accordingly give judgment for the plaintiff, reversing the decrees of the principal sudder ameen, and the former decree of this Court of the 17th June 1846. The plaintiff will recover from the defendant the amount sued for, viz. Company's rupees 6,026-10, together with interest from the present date to the date of payment. The costs of the court of first instance and of the appeal will be charged to the defendant. The plaintiff will, under the provisions of Clause 4, Section 2, Regulation 2, 1825, receive back one-half of the stamp on which the petition of review is written; and will be charged with the rest of the costs incurred in the review.

THE 11TH MAY 1848.

PRESENT :

W. B. JACKSON and

J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

E. CURRIE, ESQ.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 214 OF 1846.

*Regular Appeal from a decision passed by H. Swetenham, Esq.,
Judge of Dacca, July 28th, 1846.*

MR. C. MACKAY, APPELLANT, (PLAINTIFF,)

versus

RANEE HURSOONDREE AND RAMCHURN MUJMOODAR, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Nilmonnee Banerjee.

Wukeel of Ramchurn Mujmoodar, Respondent—J. G. Waller.

CASE No. 216 OF 1846.

*Regular Appeal from a decision passed by H. Swetenham, Esq.,
Judge of Dacca, July 28th, 1846.*

RANEE HURSOONDREE, APPELLANT, (DEFENDANT,)

versus

MR. C. MACKAY, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—Pursun Komar Thakur and J. G. Waller.

Wukeel of Respondent—Nilmonnee Banerjee.

THESE are two appeals arising out of the same case. The particulars are given in the following decision of the judge of Dacca, dated the 28th July 1846:—

“ This was an action for libel; the plaintiff sues for 25,000 rupees on account of defamation of character.

“Transferred for decision to the civil court at Dacca, by order of the Sudder Dewanny Adawlut, dated April 24th, 1845.

“Rajah Raj Singh had three sons, viz. Rajah Bishennath, Rajah Juggernath, and Rajah Gopeenath, whose widow is Ranees Hursoondree, one of the defendants. The widow of Rajah Gopeenath, Hursoondree, was desirous for a division of her portion of the estate, to which Rajah Bishennath would not accede, consequently a suit was instituted in the court of the principal sudder ameen at Mymensingh by the Ranees, widow of Gopeenath, against Rajah Bishennath and others for a division of her share of the property.

“Whilst the case was pending in the principal sudder ameen’s court and during the *mohurram* vacation, Mr. Mackay, in company with two other gentlemen, Mr. Taylor, the judge of Mymensingh, and Mr. Brodie, an indigo planter, went on a shooting excursion. They passed on their way towards the hills, both going and returning, through Doorgapore, where Rajah Bishennath resides, and encamped on a *chur* not very distant from the Rajah’s residence. The Rajah visited them, and they returned his visit the same day. It does not appear that they halted at Doorgapore, either going or returning, beyond the day on which they marched through.

“Some of the Ranees’ people were in attendance at Doorgapore. From their reports, and from the report of her *mookhtars* at the court, after the return of the principal sudder ameen to his station, the widow, Hursoondree, was induced to believe that her cause would be lost, unless she could get it transferred from the principal sudder ameen’s to the judge’s court for decision. To effect a transfer of her suit to the judge’s file, her *mookhtar* presented a petition, which has given rise to the present action for libel.

“The said petition was presented by Ram Nurain, the Ranees’ *mookhtar*. After perusal, the judge of Mymensingh rejected her prayer, and fined the *mookhtar* 100 rupees for the objectionable style of language in which the *durkhast* was dictated.

“Against the judge’s order, the Ranees appealed to the Sudder Dewanny Adawlut. An order was passed by that Court, under date the 9th July 1844, remitting the fine, and directing that the Ranees be examined on oath; that her allegations be investigated: if proved, the judge would pass necessary orders regarding the principal sudder ameen. That if he were not in fault, he would take proper notice of the Ranees’ conduct.

“On the 17th July 1844, a commission, under Act 7 of 1841, issued to the moonsiff of *chowkee* Nitro Kona to take the Ranees’ deposition on oath. Her charges constituted bribery; they were investigated and dismissed by the officiating judge, Mr. Davidson, on the 7th October 1844. A copy of the proceedings, in English, is attached to the *nuthee* in this case. The officiating judge ob-

served, the laws do not provide punishment for the Ranee; but the aggrieved party has the privilege of suing for defamation.

"Under these circumstances, Mr. Mackay has instituted proceedings against the Ranee, and also against Ramchurn Mummoodar as aider and abetter in the offence (*banee-karee*.) He pleads the loss of his character endangers the loss of his public appointment, which yields him 4,800 rupees per annum; that dishonor is reflected on his office, and that his dignity is insulted; but that he limits his claim to damages at 25,000 rupees.

"By preliminary proceedings in this court, held the 16th February 1846, the parties were called on to produce documents and evidence as follows:—

" PLAINTIFF TO PRODUCE :

(1.) Copy of the libellous *durkhast* presented to the judge of Mymensingh, through Ram Nurain, the Ranee's *mookhtar*.

(2.) Copy of the Ranee's deposition on oath taken by commission.

(3.) Copy of the *roobukaree* of the Sudder Dewanny Adawlut, dated 9th July 1844.

(4.) Copy of the English proceedings of the judge of Mymensingh, relative to the charges made by the Ranee, against the principal sudder ameen.

(5.) Proofs by evidence, or otherwise, of the aiding and abetting in the libel against Ramchurn, defendant.

" THE DEFENDANT, HURSOONDREE, WAS DIRECTED TO PRODUCE :

(1.) The original *chittees* of her *mookhtars*, Shahee Kalee Purshaud and Hurochund, in which they informed the Ranee that the principal sudder ameen, after he returned from Doorgapore, where Rajah Bishennath resided, talked of dismissing the Ranee's case, when the suit was not officially before him.

(2.) To verify the said *chittees* by evidence.

(3.) To produce copy of the deposition of Gholab Khan, who deposed before the judge of Mymensingh on investigation of the Ranee's charges against the principal sudder ameen in December 1844.

(4.) To produce Ram Gopal to give his deposition in this court.

(5.) To prove by evidence that Gholab Khan, Sumbonath and Ramgopal, did inform the Ranee that the principal sudder ameen had taken *dalees* of eatables, an ivory fan, an ivory hat, and a bank-note from Rajah Bishennath, at Doorgapore.

(6.) To produce copy of a letter from the Sudder Dewanny Adawlut, alleged to express Mr. Mackay was not injured as the complaint was dismissed.

"The documents and proofs have been produced and considered in the presence of the *wukeels* of the parties; with exception

to copy of the Sudder Dewanny's letter alleged to pronounce Mr. Mackay unscathed, copy having been refused to the defendant.

"It is evident the deposition of the Ranee taken on oath, under orders, by commission, cannot be held as any part of the libel. It is only necessary to consider the style, tenor, and diction of the *durkhast* presented by Ram Nurain to the judge of Mymensingh, on the 8th June 1844, praying that the Ranee's suit *versus* Rajah Bishennath might be transferred from the file of the principal sudder ameen to that of the judge; to ascertain if that *durkhast*, or petition, be scandalous; and, further, if it be false, for, if the charge be true, the plaintiff has received no private injury. The circumstances of aggravation and mitigation will also be considered by the court.

"The following passages in the *durkhast* above noticed are represented by the plaintiff's *wukeel* as libellous:—

'First, contrary to all the rules of propriety by which gentlemen in power are guided, the principal sudder ameen, on the pretence of going out shooting, went to the house of Rajah Bishennath Singh, defendant; in January last at Doorgapore, and there remained three or four days; every means to influence him had been adopted.

'Second, that he had delivered his sentiments in open court, when the case was not before him, to effect, that no division of the estate ever had been made, and none should be made.

'Third, that without any reference to the merits of the case, without calling for proofs of facts mentioned in the plaint or reply, he (the principal sudder ameen) required proof on trifling matters, irrelevant to the subject.

'Fourth, that the principal sudder ameen would not allow her (the Ranee's) *wukeel* to question the witnesses in elucidation of the case, and when she remonstrated on this matter, by petition, her *durkhast* was returned unread.

Fifth, it is evident my clear statements will be disguised, and the false statements of my adversary be forcibly adduced to uphold his judgment.

'Sixth, I have no hope of a favorable judgment.

'Seventh, there are other matters, I cannot commit to writing.'

"The application of the Ranee was for a transfer of her suit from the principal sudder ameen's court to the judge's: some grounds must be adduced in support of that object. The *third*, *fourth*, *fifth*, and *sixth* passages, with reference to the object of the petition, this Court does not denounce as scandalous.

"The *seventh* passage conveys an imputation, which led to an investigation. The words themselves are not actionable; and as the explanation was compulsory, detailing what the Ranee had been informed, penalty for such compulsory deposition cannot be enforced.

"The Ranee cannot, however, be exculpated in inserting in her *durkhast* the *first* and *second* passages. The assertions therein

contained have been pronounced by the officiating judge of Mymensingh, Mr. C. T. Davidson, in his English proceedings dated 7th October 1844, after full investigation, false and malicious : therefore they are scandalous, and they convey a libel against the plaintiff, for which he is entitled to damages. But the amount is subject to mitigation, inasmuch as it is true the plaintiff, on a shooting excursion with two other gentlemen, encamped at Doorgapore, and there received in tent a complimentary visit from Rajah Bishennath, which visit was returned at his house the same day, whereby the Ranee was induced to believe her opponent had acquired a degree of influence, prejudicial to her cause : and furthermore, that though only 2, out of 15 *wukeels* stated to have been present when the principal sudder ameen is alleged to have made an observation adverse to the Ranee's cause, admitted the fact, and their versions of such observation were conflictive, nevertheless, it is proved the subject was communicated to the Ranee, in writing, by her two *mookhtars* ; and though the assertion of presentation of *dalees*, and a piece of paper resembling a bank note at Doorgapore has been proved altogether false, the Ranee had been deceived in the matter, and though she credited it, she refrained from a declaration of the subject, till called on to depose all her allegations on oath.

"The Ranee Hursoondree, therefore, in having stated in her *durkhast* presented to the judge of Mymensingh, under date 8th June 1844, that Mr. Mackay, the principal sudder ameen at Mymensingh, had, in January 1844, contrary to all rules of propriety by which gentlemen in power are guided, under pretence of going out shooting, proceeded to the house of her opponent, Rajah Bishennath Singh, at Doorgapore, and there remaining three or four days, had, by every possible means, been influenced, and in having stated that the said principal sudder ameen had extra-judicially stated, in open court, that no division of the *rajgee* ever had been made, and that none should be made, which was the object of the suit at issue, in having made these assertions, which have been proved false and scandalous, the said Ranee is declared guilty of libel against the plaintiff, Mr. Mackay, to whom this court decrees damages 2,500 rupees to be paid by the defendant, Hursoondree. Ramchurn Mujmoodar has not been proved to have aided or abetted in the said libel ; he is therefore exempted from the decree. The suit against him is dismissed. His costs payable by the plaintiff. The Ranee liable to costs in proportion to the amount decreed."

Mr. Mackay appeals, objecting :—*first*, to the small amount of damages awarded.

Secondly, to the order in regard to costs ; contending that the whole of those incurred by himself should have been charged to the defendants.

Thirdly, to that part of the order which declares the exemption of the defendant, Ramchurn Mujmoodar, from all liability.

The defendant, Ranee Hursoondree, appeals generally on the merits of the case, alleging that the statements made by her, in the petition complained of, have been proved; and that in making her complaint against the principal sudder ameen, she only repeated the information communicated to her by others.

The Ranee's pleaders urge that the suit cannot be maintained under the precedent of *Hedger versus Muharane Komul Komari*, (page 29, volume VII. Sudder Dewanny Adawlut Reports). In that case it was held that defamatory and libellous expressions, when used by a party in the course of a judicial proceeding, are not actionable. The expressions were contained in an answer made by the Muharane, to an application preferred by the opposite party; both application and answer being filed in the same court, the latter, which was charged as the libel, in the ordinary course of proceeding. The course adopted by the defendant in the present case was altogether of a different character. A suit instituted by herself was pending in the court of the principal sudder ameen. Apprehensive that it would be decided against her, she presented the petition to the judge praying that her case might be transferred to another tribunal, which forms the basis of the present action. She was at perfect liberty to make the application; but, if in a gratuitous and voluntary application of this kind, which cannot be considered as a *judicial proceeding*, she chose to bring charges against the principal sudder ameen, which she has not been able to substantiate, she must stand the consequences. That an action for libel is admissible in such cases has been fully ruled by the precedents, *Bhyrob Chundur Bose*, appellant, *versus Thomas*, respondent, (page 97, volume VI. Sudder Dewanny Adawlut Reports) and *Aratoon*, appellant, *versus Riley*, respondent, page 258, Sudder Dewanny Adawlut Decisions for 1847.

The defendant in her petition presented to the judge of Mymensingh, praying for the transfer of her case, alleged certain things concerning the plaintiff, which, if false, are certainly libellous as containing innuendos and insinuations that he had been guilty of corruption. Some of the expressions made use of are given in the judge's decree, closing with the words, 'there are other matters I cannot commit to writing.' The *mookhtar* who presented this petition was fined by the judge. The defendant, Ranee Hursoondree, appealed to the Sudder Court. In her petition of appeal she repeated that her allegations were true, and offered proof in support of them. She obtained an order for enquiry; she swore to the truth of her allegations; and in her deposition declared that the 'other matters,' to which she referred in her petition, were the receipt by the principal sudder ameen from the Rajah Bishennath Singh of certain articles, including a bank-note. She pressed the investi-

gation, never attempting to withdraw or mitigate the charges, but persevering in them till they were finally pronounced 'false and malicious.' The judge is of opinion that the deposition of the Ranee cannot be held as any part of the libel. The plaintiff, however, has set it forth as such in his petition of plaint, and it certainly is an aggravation of the offence committed by her against the plaintiff in the presentation of her petition to the judge; not that the mere presentation of a petition requesting a transfer of her case, on good and true grounds, was to be condemned,—the offence consisted in the production of matter false and libellous.

The judge further finds some ground for extenuating the Ranee's conduct, in the fact that she was deceived in regard to the things said to have been received by the principal sudder ameen from the Rajah. However this may be, she is responsible for the statements put forth by her; statements too which she has never recalled, but has endeavoured to prove in the lower court, and upon the alleged proof of which she now appeals against the decree of the zillah judge.

We are of opinion, that the Ranee has entirely failed to justify the expressions made use of by her in regard to the principal sudder ameen.

In regard to the amount of damages awarded, we are of opinion that they are not excessive, with reference to the circumstances above detailed; and confirm that part of the judge's order which assesses them at 2,500 rupees.

In the cases (*Bhyrubchundur Bose v. Thomas, and Aratoon v. Riley*) already cited, the damages were laid at ten times the amount awarded; the defendant however in each case was charged with all costs. We see no reason for departing from this practice in the present case, and modify the judge's decree in this respect, and charge the whole of the plaintiff's costs in the lower court to the defendant, Ranee Hursoondree.

There remains the question of the exemption of the defendant, Ramchurn Mujmoodar, from all liability to the plaintiff's claim for compensation. There is no doubt that the person who procures or causes the publication of a libel, and all who assist in framing or diffusing it, are implicated in it. There is quite enough in the evidence of the witnesses for the prosecution, to shew that the plaintiff was fully justified in making Ramchurn Mujmoodar a defendant in the case. That he was actively engaged in supporting the Ranee from first to last is clear, and we can see no reason for charging his costs to the plaintiff.

The decision of the Court is, that the order of the zillah judge, assessing the amount of damages at 2,500 rupees, is affirmed; that the defendant, Ranee Hursoondree, be charged with her own and the plaintiff's costs; and the defendant, Ramchurn Mujmoodar, with his own costs in both courts.

THE 11TH MAY 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

CASE No. 243 of 1839.

Special Appeal from the decision of R. P. Nisbett, Esq., Additional Judge of Nuddea.

KISHOON HUREE RAE, THEN KOUNLAKANT RAE,
BROTHER AND HEIR, APPELLANT, (PLAINTIFF,)

versus

GHOLAM HOSEIN CHOWDHREE, GHOLAM IMAM
CHOWDHREE, KURUM ALI CHOWDHREE, AND
OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Gholam Sufdur.

Wukeel of Respondents—Sheonurain Chatterjee.

APPEAL laid at Company's rupees 450, for possession on 300 *biggahs* of *ohrarti*, or accession of land by recess of water of a *beel*, or marsh, called *beel* Ukdeea.

The claim of plaintiff rested on the alleged fact of the land in question being an accession formed by the recess of the waters of the *beel* Ukdeea, an admitted *mehal*, or estate of the plaintiff.

The defence denied that it ever formed part of the bed of the *beel* Ukdeea; asserting it to be a portion of a *doba*, or swamp, called *Sujea*, belonging to their estate *turf* Usthanuggur.

The principal sudder ameen, who first tried the case, passed a decree in favor of plaintiff. The additional judge in appeal reversed that decision, on the ground that although the *julkur*, or right of fishery, belonged to plaintiff, he had no right to any land that might appear from dereliction of the waters, which land became the property of the person whose land adjoined.

The point on which the additional judge has decided formed no part of the issue: it was never insisted on or urged at all by defendants. It goes, besides, on a principle inapplicable to the present case and is founded on error, because the plaintiff has exclusive right to all the land included within the boundary of the *beel*, lake or marsh, and not merely to the fishery. Therefore, if the land be really situated within the boundary of the *beel*, and have been formed by dereliction or recess of its waters, it indubitably belongs to plaintiff; otherwise it must be part and parcel of defendants' estate by which it is surrounded. This is the issue, and must be ascertained by a local investigation on the spot.

ORDERED:

That the case be remanded for the judge to depute a trustworthy person, or the *pergunnah ameen*, to repair to the spot, prepare a map, and take evidence; and, after receipt and examination of his report, and hearing of both parties on the point at issue, decide.

THE 11TH MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE; and

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 92 AND 93 OF 1848.

IN the matter of the petitions of Khettri Burr Bhugwan Raee Singh and Chowdhree Damoodur Das and others, filed in this Court on the 29th and 31st March 1848, respectively, praying for the admission of special appeal from the decision of the principal sudder ameen of Cuttack, under date the 27th December 1847; modifying that of the moonsiff of Cuttack, under date 15th May 1846, in the case of Chowdhree Damoodur Das and others, plaintiffs, *versus* Khettri Burr Bhugwan Raee Singh, defendant.

It is hereby certified that the said applications are granted on the following grounds.

There was formerly a dispute between these parties in regard to the lands of *mouzah* Aulo, a village belonging to the plaintiffs, and *mouzah* Bakershuhee-Charpeela belonging to the defendant. The lands of the defendants being under settlement, the dispute was referred to arbitration under Regulation 9, 1833. The arbitrators, as alleged by the parties, drew a boundary line describing the disputed lands of *mouzah* Aulo; to the south of which is *mouzah* Bakershuhee-Charpeela, and to the west of which is *mouzah* Pertab Roodurpore.

The former dispute having been thus adjusted, the settlement proceedings were carried to the defendants' village of Pertab Roodurpore, in the course of which the deputy collector, as alleged by the plaintiffs, interfered with the boundary laid down by the arbitrators, and made over to *mouzah* Pertab-Roodurpore a portion of the lands assigned by the arbitrators to *mouzah* Aulo. To uphold the arbitration award, and to set aside the proceedings of the deputy collector was the object of the present suit.

The defendants alleged, that the land now disputed was not included within the boundary laid down by the arbitrators.

The moonsiff gave judgment for the plaintiffs, and his decision was modified by the principal sudder ameen, who rejected the claim for a portion of the lands sued for, and admitted it for the rest.

From this decision both parties appeal.

The principal sudder ameen records his opinion; that the portion for which he rejects the plaintiffs' claim could not have been included in the arbitration award, and that the stones marking the boundary, as they now appear, were placed after the arbitrators had decided the former dispute. It appears, however, that three of

the arbitrators were examined in the course of these proceedings, and that an *ameen* was deputed with them to measure the lands and ascertain the boundary; and that the measurement of the lands, including these now sued for, corresponded with the quantity formerly declared by the arbitrators to belong to plaintiffs' village. Of this, however, there is no mention in the principal sudder ameen's decree.

We accordingly admit the appeals, and remand the case to the principal sudder ameen, who will try it *de novo*. In deciding the case, the principal sudder ameen will give in his decree the substance of the arbitration award, the report of the *ameen* and the evidence of the arbitrators, and notice such other points of the evidence as may form the basis of his judgment.

THE 11TH MAY 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 493 of 1847.

Regular Appeal from a decree passed by Moazan Hosein Khan, Principal Sudder Ameen of Bhagulpore, June 10th, 1847.

RAJAH MADHO SINGH, APPELLANT, (DEFENDANT,)

versus

RAJAH BIDYANUND SINGH, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—Gopal Kishen Raee and E. Colebrooke.

Wukeel of Respondent—Gholam Sufdur.

THIS suit was instituted by respondent, on the 16th December 1846, to recover the sum of Company's rupees 13,087-15-10½, arrears of rent due on certain *ghatwalee* lands in *talook* Khen-dooreah, *pergunnah* Hundweb, from 1251 to 1253 *Fuslee*.

On the 23d June 1846, a suit between the same parties, for the rent of 1249 F., was decided in the zillah court in favor of the present respondent; and an extract from that decision, being in all points applicable to the question now before the Court, may very well supply the place of other explanation.

'The appellant pleaded, that in his *pottah*, dated 1183 *Fuslee*, the *mal-jumma* is entered at *Sicca* rupees 1,755, and the other items consist of *Sicca* rupees 468-12 on account of impositions, denominated *mehmanee* and *nuzzurana*, and 418 rupees, 2 *annas* on account of *sayer*; making a total *jumma* of *Sicca* rupees 2,641-14,—of which the two last items cannot be claimed under the Regulations.

'The principal sudder ameen rejected this plea, and decreed in respondent's favor for the whole amount claimed by him, on the

strength of the *sunnud* of the Government abovementioned and the decision of the zillah court of the 21st April 1812, which he deemed to be conclusive as to the question mooted by appellant regarding the items of *mehmanee* and *nuzzurana*.

‘ Before this Court nothing new is pleaded.

‘ I find, on a perusal of the decision of the Court passed by Mr. John Sanford, judge, on the 21st April 1812, that it was proved, in the course of the investigation of the case, that appellant’s ancestors held a *mofussil talook*, subordinate to the zemindar of Khurruckpore, at a yearly *jumma* of *Sicca* rupees 2,818, from which 446 rupees were subsequently deducted under a previous decree (dated the 1st March 1794) on account of *sayer*; and as this decision was afterwards affirmed in appeal, it suffices to set at rest the question now mooted by appellant.

‘ Moreover, the provisions of Sections 54 and 55, Regulation 8, 1793, cannot affect a *jumma* fixed by the officers of Government previous to that enactment; nor do they disallow any impositions which may have been in force prior to the *Fuslee* year 1198; they only prohibit the imposition of any *new abwabs*. For these reasons, I see no grounds for impugning the decision of the lower court, which is hereby confirmed under Regulation 9, 1831, Section 2, with costs against appellant.’

On the same grounds as those on which Mr. Gouldsbury, in the above decision, founded the judgment he recorded, the principal sudder ameen rested this corresponding disposal of the same question. There cannot be a doubt of the correctness of the decision, and I affirm it accordingly, with costs chargeable to appellant.

THE 11TH MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 105 OF 1848.

IN the matter of the petition of Ramdhun Mookerjee and others, filed in this Court on the 7th April 1848, praying for the admission of a special appeal from the decision of the judge of zillah East Burdwan, under date the 26th January 1848; reversing that of the principal sudder ameen, under date the 18th June 1847, in the case of Ishanchundur Bhuttacharj and others, plaintiffs, *versus* Ramdhun Mookerjee and others, defendants.

This case will be found at page 8 of the decisions for East Burdwan, for the month of January 1848.

The plaintiffs sued for possession of certain lands under a deed, (called *apusnameh* by the judge, but which should have been stated as a *wapusnameh*,) said to have been executed by one

Pubetra Dibeea. The defendants, calling themselves heirs of the said Pubetra Dibeea, disputed both the execution of the deed and the right of Pubetra to execute such a document; pleading that she had only a life interest in the property. The principal sudder ameen dismissed the plaint; but, on appeal, the judge observing that the defendants had not proved themselves to be the heirs of Pubetra, restricted himself to the fact of the execution of the document by Pubetra; and, being satisfied on that point, he reversed the decision of the principal sudder ameen and decreed for the appellants.

The judge's proceedings must be considered as incomplete. If it were necessary, that is if the plaintiff denied the defendants to be the heirs of Pubetra, he should have called for evidence to that point, and then have disposed of the case. I therefore remand the proceedings to the judge for this purpose; and, if the point of heirship be established, the judge will then consider and record his opinion as to the right of Pubetra to alienate the lands.

THE 13TH MAY 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 260 OF 1847.

Special Appeal from a decision passed by Mr. J. French, Additional Judge of Tirhoot, December 11th, 1846; confirming a decree passed by Syud Ushruff Hosein, second Principal Sudder Ameen of that District, August 13th, 1844.

MUSST. JOYSUNDER KOONWUR AND OTHERS, APPELLANTS, (PLAINTIFFS,)

versus

SHEIK MOULABUKSH AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Ramapurshad Raee.

Wukeels of Respondents—E. Colebrooke and Hamid Russool.

THIS special appeal was admitted, under the following certificate, from a decision of the additional judge of zillah Tirhoot dated 11th

December 1846, the particulars of which are given at page 145 of the decisions for that district during the year 1846.

‘The plaintiffs sued as heirs of one Rasnurain Singh for possession of certain lands. The judges of the lower courts decided against them. The facts are briefly these. One Khodabuksh purchased an estate at an auction sale. He requested the collector to register the names of Odah Sing and Rasnurain Singh as joint proprietors of a 4 *annas*’ share, and himself as proprietor of the remaining 12 *annas*’ share: this was in 1814. Some years after, a suit was instituted by the heirs of the former proprietor to obtain a reversal of the sale. The heirs of Rasnurain Singh were not made parties to the suit; and Khodabuksh then filed an answer stating that they were in possession of their share, and claiming the dismissal of the plaint on account of this omission. In 1838, the rights and interests of Odah Singh in the 4 *annas* were sold in execution of a decree, and purchased by Khodabuksh (in the name of Moulabuksh) who took possession of the whole 4 *annas*. The heirs of Rasnurain Singh instituted this action to recover their share, viz., 2 *annas*; and the defence now is, that Rasnurain Singh never had any right or title in the property, and this fact the lower courts have found to be proved.

‘The special appeal is now admitted to try whether the present defence is admissible: in other words, whether the answer of Khodabuksh filed in 1836 (that is within seven years of the institution of this suit) to the plaints of the heirs of the former proprietor, is, or is not, binding upon the heirs of Khodabuksh, who claim to derive their title through him.’

The judge states in his decision, that in the answer of Sheikh Moulabuksh, it is alleged that the 4 *annas*’ share of Odah Singh was purchased at auction by his father, Sheikh Khodabuksh, who filed the answer in the suit brought by the former proprietors for reversal of the sale of the entire estate. Hence it is stated in the certificate; that the heirs of Sheikh Khodabuksh derived their right to the 4 *annas*’ share of Odah Singh through him. On referring to the answer of Sheikh Moulabuksh, we can find no statement of the kind; on the contrary, it is alleged that Sheikh Moulabuksh was himself the purchaser. Under these circumstances, the point mooted in the certificate does not arise. Added to this, it is clear that Rasnurain Singh demised many years before the period at which it was stated in the answer of Khodabuksh, that he was in joint possession of the property with the other sharers.

We accordingly dismiss the appeal, with all costs payable by the appellants.

THE 13TH MAY 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,
JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 153 OF 1847.

*Special Appeal from a decision passed by the Judge of Zillah
Tirhoot, May 30th, 1845; reversing a decree passed by the Moon-
siff of Durbungha, July 22d, 1844.*

KUMLAPUT AND RAMNATH, APPELLANTS, (PLAINTIFFS,)

versus

SHUNKER DUT JHA AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellants—Nilmunee Banerjee.

Respondents—Absent in appeal.

THIS case was admitted to special appeal, on the 9th February 1847, under the following certificate recorded by Mr. C. Tucker :—

“The application for a special appeal in this case is grounded on the fact of a default in the appellate court, of which the respondents were entitled to the benefit, but which was passed over by the judge. No mention of this was made in the decree; but the petitioners (appellants) file an attested copy of a report made to the judge by Oude Beharee Lal, a *mohurrir* of the appeal *serishta*, stating that the *mojibat* had not been filed within the prescribed period. On this report, the judge, Mr. Cathcart, passed the following order :—‘ Let such as have already been filed remain; but, in future, none are to be received unless filed within the prescribed period.’

“Special appeal admitted, as the judge exceeded his authority in disposing of the case on its merits after a default under Act 29, 1841, had been committed; and the judge should be required to explain why he omitted to notice the circumstance in his decree.”

Under the provisions of Act 17 of 1847, the plea on which this special appeal has been admitted is no longer tenable. We accordingly dismiss the appeal; and, under the peculiar circumstances of the case, order a refund of the value of the stamp on which the petition of appeal has been written.

THE 13TH MAY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.

TEMPORARY JUDGE.

CASE No. 151 of 1847.

Special Appeal from a decision passed by the Judge of Zillah Tirhoot, May 30th, 1845 ; reversing a decree passed by the Moonsiff of Durbungha, July 22d, 1844.

KUMLAPUT AND RAMNATH, APPELLANTS, (PLAINTIFFS,)

versus

PURSHUN JHA AND OTHERS, RESPONDENTS, (DEFENDANTS.)

THIS case is similar to the preceding (No. 153) ; and the same order is passed.

THE 13TH MAY 1848.

PRESENT :

C. TUCKER, Esq. AND

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 209 of 1847.

Special Appeal from a decision passed by the Judge of Zillah Tirhoot, May 30th, 1845 ; reversing a decree passed by the Moonsiff of Durbungha, July 22d, 1844.

ISHWUREE DUT JHA AND OTHERS, APPELLANTS, (PLAIN-
TIFFS,)

versus

PURSHUN JHA AND OTHERS, RESPONDENTS, (DEFENDANTS.)

THIS case is similar to the preceding (No. 153) ; and the same order is passed.

THE 13TH MAY 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 103 OF 1847.

*Regular Appeal from a decision passed by the Principal Sudder
Ameen of Zillah Tirhoot.*

MUSST. SHURFUN AND ANOTHER, APPELLANTS, (PLAIN-
TIFFS,)

versus

SHEIKH GHOLAM MOHUMMUD, MUSST. PEEAREE,
MUSST. EMAMUN, AND OTHERS, RESPONDENTS, (DEFEN-
DANTS.)

*Wukeels of Appellants—Shib Nurain Chatterjee and Looft-ur-
Ruhman.*

*Wukeels of Respondents—Hamid Russool and Kishen Kishore
Ghose.*

THE plaintiffs sued to establish their proprietary right to, and to obtain possession of a 4 annas' share of *mouzahs* Hosameepore, Jugdeespore, &c., under a deed of sale dated 6th March 1828, alleged to have been executed by the defendants. The deed of sale sets forth, that the share abovementioned was sold for the specific sum of 4,999 *Sicca* rupees, in order to enable the defendants to prosecute their claim to the entire villages to which they were entitled by inheritance, but of which they were kept out of possession by other parties. The plaintiffs state that the purchase money was paid; that the defendants then instituted their suit, alleging in their petition of plaint the circumstances of the sale to the present plaintiffs; that they succeeded in obtaining judgment for the entire villages; but that now they evaded the fulfilment of the contract entered into with the plaintiffs, by which they bound themselves, in anticipation of the judgment, to make over to them a fourth share of the property.

The defendant, Gholam Mohummud, answered, admitting the execution of the deed of sale, but pleading that he had never re-

ceived the consideration mentioned. The female defendants answered that they knew nothing whatever of the sale. Various other pleas were urged against the validity of the transaction.

The principal sudder ameen dismissed the plaint on the grounds, *inter alia*, that the female defendants were not present when the alleged sale took place; that some of them were minors at the time, and that the payment of the consideration was very doubtful.

The case was then appealed to the zillah judge. It was heard by the additional judge of Tirhoot, who, on the 31st March 1845, affirmed the decree of the principal sudder ameen, on the ground that the transaction partook of the character of champerty; and consequently, that under the precedent in the case of Birjnurain Singh *versus* Rajah Teknurain Singh, (page 131, volume VI. Sudder Dewanny Adawlut Reports) no action upon it could be sustained.

A special appeal having been applied for, the decision of the zillah court was quashed,—the suit being valued at above 5,000 Company's rupees, and the appeal in such cases being direct to the Sudder Dewanny Adawlut.

We do not consider that the action is barred by the nature of the contract. In all the cases dismissed by the Court as coming within the definition of champerty, the consideration was altogether indefinite: the stipulation was the transfer of a portion of the property sued for, on the transferee advancing money for the payment of costs; and such contracts have not been sanctioned by the Court. In the present case, the consideration was specified, but the *object* for which the money was required is also stated. The insertion of this, which may be considered as so much surplusage, cannot invalidate the deed.

Objection has been taken to the deed by the defendants on the ground that sale by a Mahomedan, of property not in his possession at the time of sale, is illegal. The *futwas*, however, on the record declare that, under the circumstances stated in the deed of sale, the sale of real property not in actual possession, is not contrary to the Mahomedan law.

We are not, however, satisfied that the consideration was ever paid. This has been denied, and the plaintiffs were bound to prove it. Their reply to the defendants' answer is by no means specific on this point; neither is the alleged admission of the defendants in the plaint of the suit instituted by them for the recovery of the entire property, a copy of which has been filed. Two witnesses have been called to prove the payment,—one of them is the plaintiff in another suit against the same defendants of much the same nature, the other is his father. Upon the evidence of these witnesses, we can place no reliance whatever.

We accordingly dismiss the appeal, affirming the decision of the principal sudder ameen, with all costs against the plaintiffs.

THE 13TH MAY 1848.

PRESENT :

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 204 OF 1847.

Special Appeal from a decision passed by Mr. John French, Additional Judge of Zillah Tirhoot, March 31st, 1845 ; reversing a decree passed by Syud Ushruf Hosein, second Principal Sudder Ameen of that district, December 26th, 1842.

SHEIKH GHOLAM MOHUMMUD, APPELLANT,
(DEFENDANT,)

versus

SHEIKH RUHUM ALI AND IQBAL ALI KHAN, RESPONDENTS, (PLAINTIFFS.)

*Wukeels of Appellant—Hamid Russool and Kishen Kishore Ghose.
Respondents—Absent in appeal.*

THIS case was admitted to special appeal, on the 15th December 1846, under the following certificate recorded by Mr. Charles Tucker :—

‘ The petitioner, Sheikh Gholam Mohummud, together with certain women were sued by Sheikh Ruhum Ali and Iqbal Ali Khan, for possession of a 2-16th share of certain villages alleged to have been sold to them by the defendants.

‘ The women replied that they knew nothing of the transaction, and had never authorized Gholam Mohummud to sell on their behalf. Sheikh Gholam Mohummud replied, that, wanting funds to carry on a suit in which he and the women were concerned, he executed the *kubala* in question to the plaintiffs, signing the women’s names to the *kubala* himself, but denied having received any of the purchase money. It further appeared, that the land sold was a portion of the same villages for which the other suit above referred to was then pending; and the condition of the sale was, that, in the event of the property being decreed to the sellers, they would then put them in possession, but at the time of the sale, they, the sellers, were not in possession.

‘ The present suit as well as another of exactly the same nature, but in which the plaintiffs, the purchasers, were different, was tried by the second principal sudder ameen, who dismissed them both, stating the transaction to be illegal. Both cases were appealed. In the suit, the subject matter of this certificate, the addi-

tional judge, Mr. French, reversed the decision of the principal sudder ameen; in the other case he confirmed it. An application for a special appeal was made in that case also; and, on finding that the suit was estimated above 5,000 rupees, I have cancelled the judge's decision in appeal, and admitted a regular appeal to this Court.

‘Under these circumstances, it seems incumbent on the Court to admit the special appeal applied for in this case, in order that both cases may be heard and tried together.’

On reference to the bill of sale in this case, we find that the money was not ostensibly borrowed to carry on the expenses of the suit, which had shortly before the sale been instituted by the sellers for the recovery of certain ancestrel property, but for the purpose of defraying the expenses attending the marriage of some females of the family, and other purposes not stated.

In the regular appeal, No. 103, disposed of this day, it has been ruled that the want of possession in the person of the seller does not vitiate the sale of immovable property; and this being a special appeal, the legality of the bill of sale is the only point open to consideration under the certificate. The judge states in his decree, that it was proved to his satisfaction that the consideration,—that is the purchase money,—was paid, and owing to the females being no party to the sale, he decreed against Sheikh Gholam Mohummud alone.

We accordingly dismiss the appeal, and affirm the decision of the additional judge with costs payable by Sheikh Gholam Mohommud, the appellants.

THE 15TH MAY 1848.

PRESENT:

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 169 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, January 25th, 1847.

BABOO PRANNATH CHOWDHREE, APPELLANT,
(PLAINTIFF,)

versus

UNOODAPURSHAD RAE, RESPONDENT, (DEFENDANT.)

Wukeels of Appellant—C. R. Prinsep, Bunsee Buddun Mittr, Hamid Russool, and Thakoordas Mookerjee.

Wukeel of Respondent—Kishen Kishore Ghose.

CLAIM for 8 annas', and upwards, share of lands in *kismut pergunnah* Mahmoodaneepore, &c., by *butwareh*, and reversal of the old *butwareh*: suit laid at rupees 20,974.

The plaintiff purchased the share in the estate in question at a public sale for arrears of Government revenue: this share had been divided off from the rest of the estate in 1803, and the division (*butwareh*) had been approved and confirmed by the Government. The plaintiff now states, that the division had been unfair, and was based on false data; in fact, that the division was unjust and fraudulent. The defendant objected to the delay of 42 years in bringing this suit to contest the justice of the *butwareh*; and, further, that the plaintiff was auction purchaser, and merely succeeded to the rights of the occupant previous to the auction sale.

On the 25th January 1847, the principal sudder ameen dismissed the claim, on the grounds abovementioned in the defence.

From this decision the plaintiff appeals, urging that the lapse of time does not affect plaintiff's claim by reason of the fraud which took place in effecting the *butwareh*.

Fraudulent possession of an opposite party for a period exceeding 12 years is no bar to a suit, but no such fraud has taken place in this case. Even admitting that the division was unfair, and that the plaintiff's share of the estate bears a higher revenue in proportion than the remainder of it, it does not follow that such unequal division arose from fraud: it might arise from error. The usual process and formalities were observed in effecting the division, and it received the sanction of the Government in 1803: the parties to the division could not question it after the lapse of 42 years. But plaintiff is not one of the parties to the *butwareh*; he has purchased the interest of one of the parties who acquiesced in it for that period, and had thus forfeited his right to question it. Again, the plaintiff's own title rests on the validity of the very *butwareh* he sues to reverse; if the *butwareh* be set aside as fraudulent and void, the sale of this separate share, on a balance of revenue calculated on the assessment under that *butwareh*, must also be declared void, and the plaintiff's right to come into court would then be entirely taken away. The counsel for the plaintiff, by varying the ground of his suit, demands a reduction of the revenue assessed on the plaintiff's share; but, besides that the suit is not laid in this shape, it would be fatal to such a claim that the Government has not been made a defendant, as the interest of the Government in such a suit is palpable, and, under these circumstances, the plaintiff must have been nonsuited.

It is also to be observed, that the decision of the Government, regarding the assessment of revenue in *butwarehs*, is final under the provisions of Regulations 25, 1793, 26, 1795, &c.; subject, in cases of fraud or error, to revision by the same authority within 3 years, extended afterwards by Regulation 11, 1811, to 10 years. The decision of the Government is not liable to be set aside by the courts of justice under the law.

The decision of the principal sudder ameen therefore, rejecting the claim, is correct, and it is hereby affirmed. Costs against the plaintiff.

THE 15TH MAY 1848.

PRESENT :

R. H. RATTRAY and

A. DICK, Esqrs.,

JUDGES.

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 80 OF 1847.

Regular Appeal from a decision passed by Mohummud Majid Khan, Principal Sudder Ameen of Bhagulpore, November 21st, 1846.

RAJAH BIDYANUND SINGH, APPELLANT, (PLAINTIFF,)

versus

ISHREENUND DUT JHA. AND PARUS THAKUR, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellant—Gholam Sufdur and Hamid Russool.

Wukeel of Respondents—Nilmunee Banerjee.

THIS suit was instituted by appellant, on the 19th May 1845, to recover the rents of *mouzahs* Afzoonpore and others, in *pergunnah* Suhrooe, from *Magh* 1247 to 1251 *Fuslee*, in virtue of an *ikrarnamēh* filed in the case : total, principal and interest, estimated at Company's rupees 22,101-5-9.

The claim was opposed by the respondent, Ishreenund Dut, on the ground of the *ikrarnamēh* upon which the claim was based, having been executed by his *mokhtar*, Parus Thakur, under a *mokhtarnamēh*, or power of attorney, furnished to him, by Ishreenund Dut, blank, to be filled up by the *mokhtar*, in respect to certain matters pending between appellant and Ishreenund Dut, according to verbal instructions given by the latter; that the terms of the *ikrarnamēh* were not warranted by these instructions, and are opposed to those of the *mokhtarnamēh* itself; which latter, again, was not drawn up by the *mokhtar*, Parus Thakur, who did not understand the character in which it was written (the Persian) but by one Mohun Thakur, a dependent of appellant, in conformity with the views and interests of his master. That the former rent of the lands held by Ishreenund Dut was 592 rupees, which amount the *ikrarnamēh* has raised to 6,180; and that the balance of mesne profits, the accounts of which are based upon the assumed

correctness of this enhanced rent, has no real existence, and never has been, or could have been acknowledged; while, under the terms of the *mokhtarnameh*, an acknowledgment was an indispensable preliminary to the legality of the demand.

Respondents' story of the blank *mokhtarnameh* was denied by appellant, who claimed under the deed impugned, and the general merits of the case.

The principal sudder ameen, exempting Parus Thakur, as *mokhtar*, from all liability, admitted Ishreenund Dut's plea of the blank *mokhtarnameh*; determined the whole transaction to have been irregular and illegal; and dismissed the suit. Hence this appeal.

We find, from the terms of the *mokhtarnameh*, that the authority to execute an *ikrarnameh*, or deed of final agreement, between the principals concerned in the transaction, was contingent on the previous consent of those principals to the amount of mesne profits proposed to be carried to account; that such consent was not given, and that, consequently, the *ikrarnameh* was executed without due authority, and is void and of no effect. The claim for mesne profits, being founded upon it, cannot stand: but appellant may sue for these independently of the *ikrarnameh*, with which only, in the present instance, we have to deal.

We do not consider the grounds of dismissal of the suit recorded by the principal sudder ameen to be just or tenable; though we deem the judgment itself to have been correct and proper. We affirm it accordingly, with costs payable by appellant.

THE 17TH MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE; and

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

PETITION NO. 815 OF 1847.

IN the matter of the petition of Hurlal Singh, *mokhtar* of Baboo Perm Nurain Singh, filed in this Court on the 7th December 1847, praying for the admission of a special appeal from the decision of the principal assistant agent of Hazareebaugh, under date the 11th September 1847; reversing that of the moonsiff of Hazareebaugh, under date 10th December 1846, in the case of the petitioner, plaintiff, *versus* Shewa Mehtoon and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff alleges that he had incurred a loan to the defendants, and, as security for the debt, had given his lands in farm to them. That the debt had been liquidated from the usufruct, and he now sued for possession. The defendants denied the liquidation, and stated that the lease had to run a considerable time longer.

The moonsiff entering into the merits of the case, gave judgment for the plaintiff.

The principal assistant, considering that the plaintiff could not recover before the expiration of the period mentioned in the lease, dismissed the plaint, reversing the moonsiff's judgment.

We do not consider that the principal assistant has sufficiently investigated this case. It was incumbent upon him to enquire whether the lease was given merely as security for the debt; and, if so, then the plaintiff was entitled to recover his property, provided that on an investigation of the amount realized by the defendants, it should appear that the principal, with interest at the legal rate, had been paid off, as the law cannot recognize any engagement which gives to the lender a higher sum than such principal and interest combined.

Under these circumstances, we remand the case for re-investigation by the principal assistant, with reference to the preceding remarks.

THE 18TH MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE; and

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

PETITION No. 126 OF 1848.

IN the matter of the petition of Ram Komar Mustofee and others, filed in this Court on the 24th April 1848, praying for the admission of a special appeal from the decision of J. C. Brown, Esq., judge of zillah Nuddeah, under date the 28th January 1848; reversing that of Ram Lochun Ghose Raee, principal sudder ameen of the same zillah, under date the 19th June 1846, in the case of Ram Komar Mustofee and others, plaintiffs, *versus* Hurodeb Prudhan and Kylas Nath Prudhan, defendants.

This case will be found at length at pages 2, 3, and 4 of the monthly decisions for January 1848, for zillah Nuddeah, and it is needless to enter the details here. The suit is for the right to assess the lands in the occupancy of the defendants at *pergunnah* rates; and the

judge has dismissed the claim, without entering on its merits, on two grounds:—*first*, the suit is barred by Section 16, Regulation 3, 1793; and, *secondly*, that it is barred by Section 14, Regulation 3, 1793. The judge refers to the decisions of 28th August 1818 and 12th June 1820, in support of his first ground; but, it is clear from his own shewing, they do not bear him out. In that of 28th August 1818, the plaintiffs' claim to future enhancement of the rents, then paid by the defendants, was expressly reserved. It is inconsistent, therefore, to argue that that point has already been finally adjudicated.

On the other point,—the law of limitation,—it has been ruled more than once by this Court that the claim to assess is a perpetually recurring cause of action, and cannot be barred by lapse of time. The question of the right to enhance the rents of under-tenants, must therefore, when raised, be disposed of on its merits. Under these circumstances, we admit a special appeal, and remand the proceedings to the judge, who will restore the appeal preferred to his court, from the decision of the principal sudder ameen, to his file, and dispose of it on its merits.

THE 18TH MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE; and

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 359 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Rajshahye, August 20th, 1845.

GOVERNMENT, APPELLANT, (DEFENDANT,)

versus

BRIJSOONDREE DASEE AND PEAREESOONDREE

DASEE, RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellant—Pursun Komar Thakur.

Wukeel of Respondents—Gholam Sufdur.

RESPONDENTS sued the joint magistrate of Pubna, together with a Mr. Watts, for possession of Dulalpoor *alias* Radhanuggur ferry, with mesne profits from 1237 B. S., laying their suit at Company's rupees 13,509-8.

The ferry is situated in *pergunnah* Islampoor, the property of plaintiffs, and is entered in the lot *neelamee* papers of 1205 as an asset of the decennial settlement; its proportion of the *sudder jumma* of the *pergunnah* being rupees 5-7-8. On the enactment of Regulation 19, 1816, it was taken charge of by the collector of

Rajshahye, but subsequently abandoned ; after which it remained some years in the possession of the zemindar, until in 1237 B. S. the joint magistrate assumed the control of it under Regulation 6, 1819,—the plaintiffs' estate being then under the management of the court of wards.

In 1238, plaintiffs, as they state, petitioned the joint magistrate and the commissioner for the release of the ferry. The case was eventually referred to the superintendent of police, and was lost with other papers on the swamping of that officer's boat. Plaintiffs now seek redress in the civil court.

The principal sudder ameen has given a decree in favor of plaintiffs.

The facts are not disputed. The decision of the case turns entirely upon a question of law, embracing these two points :—

First, whether claims connected with the assumption of the management of ferries by the magistrates are cognizable, generally, by the civil courts ; and, if not, *secondly*, whether the special circumstances of this case are such as to bring it within the court's jurisdiction.

For the determination of the question, it is necessary to consider both the person sued and the thing sued for, or the person sued in all such cases must be the magistrate, or joint-magistrate. But these officers are not among the functionaries declared amenable to the civil courts, for acts done in their official capacity, by Section 10, Regulation 3, 1793 ; nor are they subject to any of the authorities mentioned in Section 3, Regulation 2, 1814, which prescribes the process to be followed by the courts in the case of suits brought against public officers. The official acts of magistrates, therefore, would seem to be exempt from the jurisdiction of the courts. Again, with reference to the subject of suit, by Regulation 19 of 1816, all ferries were placed under the control of the collectors ; and, by Section 9 it was declared that claims to deductions, or compensations on account of their resumption, should be reported by the revenue authorities for the consideration and orders of the Governor General in Council, and the courts of judicature should not take cognizance of them. By Regulation 6, 1819, that law was rescinded ; and such ferries as Government might think proper to assume the management of were placed under the control of the magistrates. The provision for the reference of claims to compensation for the consideration and orders of Government, *mutatis mutandis*, was re-enacted : the express restriction of the authority of the courts being however omitted, doubtless because the official acts of magistrates not being subject to the jurisdiction of the courts, such a restriction would have been mere surplusage. There can be no doubt therefore, that as regards the general question in suits of this nature, the jurisdiction of the courts is barred.

But it is urged specially, that in this case the suit is not for compensation, but for possession,—the act of the joint magistrate in taking charge of the ferry having been irregular and unauthorized, inasmuch as the previous sanction of Government, required by Clause 2, Section 3, Regulation 6, 1819, was not obtained. Now, not to dwell on the fact that the ferry had been previously subjected to assessment by the collector under the provisions of Regulation 19, 1816, and it may, therefore, be a question whether under the letter of the section referred to the previous sanction of Government was necessary, it is evident that the assumption of the management of the ferry was, to all intents and purposes, *an official act of the joint magistrate*. The circumstance of its being opposed to the regulation (if it were so) does not make it the less an official act, or bring it under the cognizance of the courts; for the very acts for which collectors and others, *not* magistrates and joint magistrates, are declared amenable to the courts, are ‘acts done in their official capacity in opposition to any regulation.’

The specialty pleaded, therefore, does not remove the bar to the court’s jurisdiction. The decree of the principal sudder ameen must be reversed, and the original plaint dismissed; all costs being charged to respondents.

THE 18TH MAY 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE; and

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 136 OF 1838.

Special Appeal from a decision passed by George Cheap, Esq., Judge of Mymensingh, September 21st, 1837; altering a decree passed by Julalooddeen Mokummud, Principal Sudder Ameen, September 26th, 1834.

MUDDUN GOPAL BADUREE AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

MUHA RANEE KISHEN MUNNEE DIBEEA AND OTHERS,
RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Gholam Sufdur.

Wukeels of Respondents—J. G. Waller and Taruck Chundur Raee.

THIS case was admitted to special appeal, on the 21st December 1837, by Mr. William Braddon. This case was instituted on

1st June 1832, but it is necessary to record here the proceedings had previous to that date.

On 30th September 1816, the appellants in this case instituted a suit against the respondents, for the recovery of 45 *khadas* of land, stating, in general terms, that disputes having arisen regarding them, a summary award for possession had been obtained by the respondents; to reverse which order, and try the rights of the parties to the disputed lands, the suit was brought. This plaint was nonsuited on 5th September 1823, because it appeared that there had been two summary cases,—one under Regulation 49, 1793, regarding 10 *khadas*,—the other under Regulation 6, 1813, regarding 20 *khadas*, with different parties and at different periods; and that the lands connected with both had been included, but without specification, in the plaint.

The present suit was then instituted to reverse the summary award of the 2d April 1816, under Regulation 6, 1813, and for 15 *khadas* more, which the appellants asserted the *ameen* deputed to give the respondents possession of the 20 *khadas* awarded to her, had given to her in excess thereof. The appellants claim the 35 *khadas* of land as appertaining to their village Mirzapoor. The respondents allege they appertain to their village Burseela.

The case was first tried by Sumbhonath Muzoomdar, sudder ameen, when the claim was valued at rupees 302-2-6; that officer decided *ex-parte*, dismissing the claim. An appeal was preferred, which was referred for trial to the principal sudder ameen, Julalooddeen Mohummud, and whilst pending before his court, the valuation was raised to rupees 2,000 by a supplementary plaint. The principal sudder ameen reversed the decision of the lower court, decreeing in full for the appellants. An application for a special appeal was then made to, and rejected by the judge; but, on a further application to this Court, the judge was directed to consider the principal sudder ameen's decision as the primary one, and to admit a regular appeal to himself,—the subsequent valuation of the claim at the sum of rupees 2,000 barring the jurisdiction of the sudder ameen, whose decision was, therefore, to be held to be null and void. Accordingly, the judge admitted the appeal under these orders of the superior Court; and, on the 21st September 1837, modified the decision of the principal sudder ameen.

From this decision the present appeal to this Court was preferred, and the case was first heard by Mr. Lee Warner, who, on 31st August 1840, gave his opinion for affirming the decision of the principal sudder ameen. The case next came on to be heard before Mr. A. Dick, who, on the 9th December 1840, recorded his opinion for reversing the decisions of both the lower courts, and would dismiss the claim *in toto*. In consequence of this difference of opinion, the case was referred to a third judge

(Mr. D. C. Smyth), who was of opinion that the suit was barred by the statute of limitation. He observed that the suit was brought to reverse a summary award passed on the 2d April 1816, and should have been instituted within 12 years from that date; that he would make no allowance for the period the original suit was pending in the lower courts before it was nonsuited. This point was eventually referred to all the judges of this Court; and, on 21st November 1846, it was determined that the appellants were entitled to an allowance for the period their first suit was pending in court before it was nonsuited; and, under this construction of the law, the suit was found to be in time. It was then referred to a full bench to be disposed of on its merits, and came on this day for that purpose.

We observe, that though the decree of the judge considerably diminishes the award of the principal sudder ameen in favor of the appellants, yet still it is in the main against the respondents, who, however, have not appealed against it.

After mature consideration of the proceedings of the ameen deputed to make a local investigation and a map of the disputed lands, we do not consider that the appellants have established a right to any more lands than is awarded to them by the judge's decree, which we accordingly affirm, and dismiss the appeal with costs against the appellants.

THE 20TH MAY 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 24 OF 1847.

Special Appeal from a decision passed by W. H. Marten, Esq., Additional Judge of Zillah Hooghly, January 2d, 1845; reversing a decree passed by Edward Sterling, Esq., Collector of that Zillah, January 5th, 1843.

SHEIKH SHUFAETOOLLAH, APPELLANT, (DEFENDANT),

versus

JOYKISHEN MOOKERJEE AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

Wuheel of Appellant—Pursun Komar Thakur.

Wuheel of Respondents—Ramapurshad Raee.

THIS case was admitted to special appeal, on the 25th August 1846, under the following certificate recorded by Mr. C. Tucker :—

‘ This is a case in which the plaintiffs sued to resume certain lands held by the defendant, Shuffaetoolah, as *lakhiraj*. The collector decreed in favor of the *lakhirajdar*; but, on appeal, the additional judge reversed the collector’s decision, because he considered the *lakhirajdar*’s documents to be forgeries. But he did not enter into the question of the right of the zemindar to sue at this time of day to resume the lands. It was not proved on his side that rent had ever been paid for the lands in question, whilst possession as *lakhiraj* in the defendant’s family from a remote period is acknowledged.

‘ I admit this appeal to try whether a zemindar can now sue to resume and assess lands, held as *lakhiraj* from a period antecedent to the decennial settlement.’

The decision of this suit depends entirely upon the determination of the question, whether the general law of limitation is applicable to suits instituted by zemindars for the resumption of *lakhiraj* tenures; and involves the consideration both of the laws which have been enacted, and the practice which has prevailed in regard to this subject.

Regulation 19, 1793, speaks of three general classes of *lakhiraj* grants.

First. Grants made previous to the 12th August 1765, the date of the Company’s accession to the *Dewanny*.

Secondly. Grants which have been made since the 12th August 1765, and previous to the 1st December 1790.

Thirdly. Grants made since 1st December 1790.

The question of the applicability of the law of limitation to the grants of the first class, will now seldom arise. If the grants meet the conditions laid down in Section 2, Regulation 19, 1793, and Regulation 14, 1825, they are valid. If they do not, then, as in cases of the second class, it may be asked whether the general law of limitation is not a bar to resumption by the zemindars; but suits by zemindars, for the resumption of grants made at a period prior to the Company’s accession to the *Dewanny*, are not now by any means frequent.

By Clause 2, Section 2, Regulation 19, 1793, it is enacted that ‘ no claim to hold exempt from the payment of revenue land that may have been subjected to the payment of revenue for the 12 years preceding the date on which the claim may be instituted shall be heard by any zillah or city court, unless the claimant can shew good and sufficient cause for not having preferred the claim to a competent jurisdiction within the 12 years, and proceeded in it as required by Section 14, Regulation 3, 1793.’ It has been argued that the converse of this position must hold good,—that is, if a *lakhirajdar* has held land exempt from the payment of revenue, for 12 years prior to the date of the institution of the suit, the claim to resume is barred by

lapse of time. The rule, it must be borne in mind, refers to grants made before the 12th August 1765, and to none other; and to such grants alone must the converse of the proposition be limited. But further, the section contains certain conditions as essential to the validity of such grants; and in the proviso cited declares that under certain circumstances, viz. the payment of rent, or revenue, for 12 years prior to the institution of the suit a grant is invalidated, though fulfilling all the essential conditions previously laid down. The rule at the close of Clause 2 of the Section is special, and restricted to the claim of the *lakhirajdar*; and care must be taken that the converse drawn from the special is not subversive of the general rules and provisions of the enactment. Besides, it appears to us, that had the legislature intended that the general rule of limitation should apply to such claims for resuming *lakhiraj* grants, it would have so declared by an express provision, instead of leaving the inference to be drawn from a mere exception to the general provisions of the section; especially as the terms of the section may, without any straining of their meaning, be so construed as to lead to the conclusion that the general law of limitation is not applicable to such claims.

In regard to the third class of grants, there can be no doubt. Section 10, Regulation 19, 1793, declares that they 'are null and void, and that no length of possession shall be hereafter considered to give validity to any such grant, either with regard to the property in the soil, or the rents of it.' The general law of Section 14, Regulation 3, 1793, and the special law of Section 10, Regulation 19, 1793, were enacted by the Supreme Government on the same day; and, therefore, the general law cannot over-rule the special provision, which can be repealed only by another special law. In the absence, however, of any such provision as that of Section 10, Regulation 19, 1793, it appears to us that the courts of justice must have held that grants made at a period subsequent to the date of the permanent settlement are null and void. It is a narrow and contracted view to suppose, that the permanent settlement consists in nothing more than the obligation on the part of the zemindar to pay a certain amount of revenue annually to the Government. The settlement is a compact by which the zemindar engages on his part to pay a fixed amount of revenue to the State; and the State on its part guarantees to the zemindar, by means of its judicial and fiscal administration, the integrity of the assets from which that revenue is derived, and which in fact constitute the Government's own security for the realization of its revenue. The declaration to the zemindars and other proprietors of land, that the *jumma* assessed upon their lands is fixed for ever (Section 3, Regulation 1, 1793), carries with it, by necessary implication, a rule of the nature laid down in Section 10, Regulation 19, 1793.

We now come to the grants of the second class, viz. those made since the 12th August 1765, and previous to the 1st December 1790, which give rise to by far the greater number of suits of this kind instituted in our courts.

The question is sometimes asked, why, if the law of limitation does not apply to such cases, is it provided in Section 10 that no length of possession shall give validity to the grants therein mentioned, while no such provision is to be found in regard to grants made before 1st December 1790? The answer is clear. The grants referred to in Section 10 are absolutely null and void; those mentioned in Section 3 of the same Regulation are declared to be *invalid*. The grantees in the former case have no right, under any length of possession, either to the property in the soil or the rents of it: the grantees in the latter case have a right to both. The grantees in Section 10 can be ejected at once: those alluded to in Sections 3 and 6 cannot be ejected at all. The grants of the former are good for nothing: those of the latter are good for every thing, except the exemption from the payment of rent, or revenue. The grant, *as such*, is *invalid* in this one particular; but the holder is entitled to have the settlement made with him, which the holder of the grant under Section 10 is not. Hence the provision of Section 10, regarding length of possession, would have been altogether inapplicable to the grantee of Section 3.

Had the question the Court is now called upon to decide, come before it immediately upon the expiration of 12 years from the date of the permanent settlement, or from the date of the enactment of Regulation 19, 1793, the difficulties which now beset it might have been considerably diminished. The judgment might have given rise to the interference of the legislature if considered to be wrong: if right, it would have remained as a precedent for future guidance. The decision, probably, would not have been arrived at without some difficulty in weighing the conflicting arguments for and against the application of the rules of limitation. As the lands included in the grants made before 1790 were not taken into account in the formation of the settlement, the question might have been asked why the law of limitation should not apply to such, being grants for land below 100 *biggahs*, the revenue assessable on which was declared to be the right of the zemindar, especially as by Section 12 of the Regulation it was declared that 'no lapse of time shall be considered as a bar to the recovery of the public dues' from lands comprised, in grants exceeding 100 *biggahs*? On the other hand, an argument in favor of the zemindar's right of resumption might have been drawn from the unrestricted terms of the preceding sections, and the evident intention of the legislature of 1793 to maintain the zemindar in the

enjoyment of the privileges, as well as of the rights conferred upon him at the formation of the permanent settlement.

But, instead of speculating upon the possible judgment of the Court had the question come before it immediately on the expiration of 12 years from the cause of action, we proceed to notice the course of legislation and practice in regard to this subject for the last 40 years.

The 12 years from 1st December 1790, expired on the 1st December 1802, and from the date of Regulation 19, 1793, on the 1st May 1805. From that period to the year 1819, hundreds of cases under the resumption laws must have been instituted in the several courts of the districts under this Court. We have asked and searched in vain, however, for one to which the general law of limitation was applied, or in which it was even pleaded by the *lakhirajdar*.

In 1819, the Government enacted Regulation 2 of that year. By Clause 1, Section 30, it is enacted that all suits preferred in a court of judicature by proprietors, farmers, or *talookdars* to the revenue of any land held free of assessment, as well as all suits so preferred by individuals claiming to hold lands exempt from revenue, shall, immediately on their institution, be referred for investigation to the collector, or other officer exercising the powers of collector. By a subsequent provision of the same clause, parties are declared at liberty to institute their suits before the collector at once, instead of preferring them to a court of justice. By Clauses 2, 3, and 4, the collector is instructed how to proceed in such cases, and is required to decide them upon their merits; that is, he is required to decide upon the validity, or otherwise of the grants, and the liability or otherwise of the lands to resumption; and that in every case without exception. But, if the law of limitation is to apply to such cases, whence the necessity of a reference to the collector to pronounce upon the validity of the grant? or still more, whence the necessity of a law of procedure in 1819, to investigate the validity of grants, which, by lapse of time, had become valid in 1802 or at latest in 1805? The only answer is, that the legislature, guided by the practice of the courts, considered the question of limitation as settled in the negative; and, upon these premises, proceeded to the enactment of a law of procedure for the direction of the functionaries to whom the investigation of such suits was thenceforth to be entrusted. The enforcement of the terms of this law cannot co-exist with the application of the general law of limitation to such cases.

We next come to the provisions of Regulation 19, 1825, by the 5th Section of which the rules of Section 30, Regulation 2, 1819, are extended to collectors when engaged in making settlements under Regulation 7, 1822. This law appears to contemplate only an enquiry into the validity of the title.

Again, the terms of Regulation 14, 1825, enacted 60 years after the date of the Company's accession to the *Dewanny*, and 35 years after the date of the permanent settlement, cannot contemplate the application of the general law of limitation to suits instituted for the recovery of *lakhiraj* tenures. The terms of the Regulation are very general; but as we are led to think from some of its provisions, that the legislature, in enacting it, had in view only the grants resumable by Government, we do not lay much stress upon it in considering the question now before the Court.

To the course of legislation of subsequent years, however, may be opposed the provisions of Section 2, Regulation 2, 1805. The special law of limitation of 60 years is therein applied to all claims on the part of Government for the assessment of lands held under *lakhiraj* titles; and it may be urged with much force, that it was not the intention of the legislature to exempt similar claims of land-holders from the operation of the general law of 12 years. But yet there is no doubt that the courts of justice never did apply the law to such cases, but practically held all along that they came under the 'provisions and exceptions' mentioned in Clause 1 of the Section. This conclusion was not come to without some ground for it. It must be borne in mind, that though the grants under 100 *biggahs* were not taken into account as rent-yielding assets at the formation of the permanent settlement, yet, unquestionably, they were considered by the Government as affording additional security for the punctual realization of its revenue. They constitute a source from which the zemindar might derive an addition to his income, and this afforded to him additional means for the regular payment of his dues to the State. That the object of the Government was to secure to the zemindar the rights and privileges thus conferred upon him, is clear from its whole course of legislation. Clause 1, Section 3, Regulation 2, 1819 (passed long after the period laid down in Section 14, Regulation 3, 1793, had expired), after declaring the liability to assessment by the Government of all lands not comprised within the limits of a permanently assessed estate, proceeds as follows:—'Provided, however, that nothing in the above rule shall be construed to affect the rights reserved to zemindars, *talookdars*, and other proprietors of estates, with whom a permanent settlement has been concluded, to the exclusive enjoyment of the rent assessed on lands held on invalid tenures free of assessment, within the limits of their respective estates and *talooks*, and of which the extent may not exceed 100 *biggahs* if in Bengal, Behar, or Orissa, and 50 *biggahs* if within the province of Benares.' The same object for providing for the security of the revenues of the State and of the rights and privileges of the zemindars, is further apparent from the uniform tenor of the laws from the date of Regulation 44, 1793 to that of Act 1 of 1845, in regard

to sales of estates for arrears of revenue, which provide that the purchasers of all such estates shall receive them free of all incumbrances imposed upon them after the time of settlement, which could not be were they debarred the right of suing to resume the tenures declared by law to be invalid at the time of settlement, on the ground that they had, notwithstanding, become valid since that time, by the operation of other causes than those affecting the original character of the tenures.

In a draft-resumption act prepared by Mr. Millett, in the year 1837, it was proposed to be enacted that the limitation fixed for the commencement of civil suits shall not be held to bar the cognizance of claims by zemindars for the recovery of the revenue of *lakhiraj* lands. On the Section which contains this proposed rule, Mr. Millett remarks :—‘ It is not easy to discover whether the rules of limitation contained in Section 14, Regulation 3, 1793, and Section 8, Regulation 7, 1795, do, or do not, apply to claims on the part of individuals for the recovery of the revenue of lands held *lakhiraj*. In practice they are not held applicable. But if it be determined that they are applicable, it would be well to define clearly at what time the cause of action is to be regarded as having arisen.’ As to the difficulty felt in discovering whether the rules of limitation were, or were not, applicable in such cases, we conclude it arose from the differing interpretations of which, under different views, the law was susceptible. It is clear it could not have arisen from any doubt as to the practice, for Mr. Millett, a most excellent authority in the matter, distinctly states that in practice the *general* rules of limitation were not held applicable. Such then being the practice, it appears to us that the legislature could not well pass a law enacting that they shall apply. To do so at a time when it is presumable that most of the invalid *lakhiraj* tenures have been contested in court by the zemindars, and decided without reference to those general rules of limitation, would, indeed, be to benefit the remaining few, but at the same time to impress the greater number, whose titles had already been declared invalid, with the conviction that they had been hardly dealt with. The only course open for the legislature was to do as proposed by Mr. Millett, to declare that the rules of limitation should not apply, but to fix a date beyond which no such suits should be admissible in Court.

The practice of the courts appears to have been uniform up to the period of Mr. Millett preparing the draft-resumption act above alluded to. We cannot find a single case up to that period, in which the rules of limitation were applied to cases regarding the resumption of *lakhiraj* titles. In fact, the application of the rules of limitation never appears to have been contemplated until a very recent period.

The question, however, was judicially tried in two cases in 1836. In the case of Soohdeb Chowdhree and others, *v.* Chadee Lal, decided on 2d July 1836, the special appeal was admitted expressly to try the question of limitation; and it was finally ruled that the general law of limitation did not apply to such cases. It was proposed to publish this case as a precedent, but the objections of some of the judges prevented its insertion among the selected reports. The opinion of the judges (Messrs. Stockwell and Barwell), is thus expressed :—‘ There is no doubt that the defendant’s family have held the lands as rent-free for a number of years, extending back to a period prior to the decennial settlement; but we are of opinion that the plea urged by the appellants, against the admissibility of the claim under the law of limitation, cannot be maintained, for the rule of Section 14, Regulation 3, 1793, alluded to by them, does not apply to such cases.’ The same judgment was pronounced in the case of Becharam Mundul, *v.* Gungagovind Mundul and others, decided on the 26th December 1836, by Messrs. Stockwell and Hutchinson. The *general* course of legislation and the practice of the courts was, therefore, uniform up to the year 1840.

Since 1840, conflicting judgments have been passed according to the opinions of the deciding judges; but, adverting to the cases of Dost Mahomed Khan, *v.* Kashee Isree Dibbea, and Bulram Panda, *v.* Sheikh Gool Mahomed, decided on the 28th January 1846, (pages 22 and 25 of the decisions for 1846,) it would appear that the tendency is to revert to the practice as it existed before 1840.

The inapplicability of the law of limitation to such cases, may be further inferred from the practice which prevails in regard to *mocurrurree* tenures. The *lakhirajdar* pays no rent at all; the *mocurrurree* pays a privileged, or it may be a small quit rent. Now, looking at these two cases, *merely* with reference to the rules of limitation, there is no reason why the *lakhiraj* tenure should be unassailable 12 years after the cause of action, and the *mocurrurree* tenure should be resumable and assessable at a higher rate after the same period. The rules of limitation have never been applied in practice to *mocurrurree* tenures; and upon a recent occasion (see case of Meertunjoy Shah and others, *v.* Baboo Gopal Lal Thakoor, page 217 volume VII. Sudder Dewanny Adawlut Reports, also that of Neekoos Marcass, *v.* Ram Lochun Ghose, page 221, volume III.) when the subject was considered at large by the Court, the opinion was recorded that the claim to assess being a perpetually recurring cause of action cannot be barred by the lapse of time; and this opinion was adopted by the majority of the Court. The same principle appears to us to be applicable to a *lakhiraj* tenure. In the case of a *mocurrurree* tenure, the zemindar sues

for a higher rent where he got some rent ; in the case of a *lakhiraj* tenure, he sues for some rent where he got none. The claim in both cases is to *assess* ; and there is no reason why the principle which has been applied to the one case, should not be applicable to the other.

The question might be urged, with reference to these two classes of tenures, whether why the same provision that has been enacted by Section 26, Act 1, 1845 in regard to *mocurrurree*, should not have been enacted also in regard to *lakhiraj* tenures ? The records of this Court supply the answer. The provisions of Section 26, Act 1, 1845, are a mere repetition of those of Section 27, Act 12, 1841 ; shortly before the enactment of which a discussion took place in this Court, as to the rights of auction purchasers in regard to the ejectment of *mocurrurreedars*. The question was submitted to Government, and hence the provisions which followed. In regard to *lakhirajdars*, the practice had been uniform and no discussion had arisen ; and hence there was not the same necessity for legislating for them.

It thus appears from the course of legislation for a series of years, and from the uniform practice of the courts, except for a short interval, that the rules of limitation laid down in Section 14, Regulation 3, 1793 are not applicable to suits by zemindars for the assessment of land held as *lakhiraj*, under tenures declared to be invalid.

This interpretation of the law derives considerable force from another consideration. It is to be observed, that the revenue of invalid *lakhiraj* lands is a public due, though in certain cases assigned to the zemindars. In temporarily settled *mehals*, this assignment is only temporary ; and in those settled permanently, the Government retains a contingent interest in the event of the settlement breaking down, and the *mehal* being thrown on the hands of the Government.

Considering, therefore, that the Court cannot, at this time, come to any other conclusion than that the general rules of limitation laid down in Section 14, Regulation 3, 1793, do not apply to suits instituted by zemindars for the resumption of invalid *lakhiraj* tenures, we dismiss the appeal with costs ; and affirm the decision of the zillah judge.

THE 20TH MAY 1848.

PRESENT:

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 25 OF 1847.

Special Appeal from a decision passed by W. H. Marten, Esq., Additional Judge of Hooghly, December 14th, 1844; reversing a decree passed by Edward Sterling, Esq., Collector of that Zillah, January 5th, 1843.

SHEIKH SHUFAETOULLAH, APPELLANT, (DEFENDANT,)

versus

JOY KISHEN MOOKERJEE AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

THIS case was admitted to special appeal by Mr. Charles Tucker on the same date, and for determination of the same point as is contained in the certificate given in the preceding case (No. 24.) The difference in the two cases being only as respects the claim to resume different portions of land, and the order passed is the same.

THE 20TH MAY 1848.

PRESENT:

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 112 OF 1848.

IN the matter of the petition of Sumrun Raee and another, filed in this Court on the 17th April 1848, praying for the admission of a special appeal from the decision of Niamut Ali Khan, principal sudder ameen of zillah Tirhoot, under date the 17th January 1848; reversing that of Samuel Da Costa, acting moonsiff of the said zillah, under date the 16th March 1847, in the case of Holas Singh, plaintiff, *versus* Sumrun Raee and another, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff was nonsuited before the acting moonsiff. In appeal, the principal sudder ameen cancelled the order of nonsuit, tried the case on its merits, and disposed of it by a decree in plain-

tiff's favor: thus rendering the appellate court in which he was presiding a court of first resort, and depriving the defendant of his appeal of right against the judgment.

I direct the return of the case for revisal and disposal agreeably to the practice of the courts. The usual order will issue in regard to stamps and costs.

THE 20TH MAY 1848.

PRESENT:

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,
JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 261 of 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, December 7th, 1846; reversing a decree passed by the Moonsiff of Busheerhaut, August 20th, 1846.

RAMDHUN DEY AND OTHERS, APPELLANTS, (DEFENDANTS),
versus

RAMDHUN GOON, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Kishen Kishore Ghose.

Wukeel of Respondent—Pursun Komar Thakur.

THIS case was admitted to special appeal, on the 5th May 1847, under the following certificate recorded by Sir R. Barlow:—

‘Ramdhun Goon sued for possession of *kismuts* Katra and Ram Isherpore, a *talook* in *pergunnah* Bulea, on the 24th November 1842, or the 10th *Aghun* 1249, on the strength of a mortgage bond signed by Nobeen Chundur and Degumberee, dated the 21st *Phalgun* 1236, or 3d March 1830. Application was made for foreclosure on the 11th September 1835, or 27th *Bhadoon* 1242. The defendants, Hoymabuttee and Degumberee, denied execution of the mortgaged bond. The defendants, Ramdhun Dey and Hulo-dhur Dey, pleaded an out and out purchase from the females on the 12th *Chyite* 1241, or 24th March 1835,—the deed of sale having been duly registered on the 10th of August of the same year.

‘The females had instituted an action against Ramdhun Dey and others, for possession of these lands, on the 15th September 1842, or 31st *Bhadoon* 1249. They admitted the sale, but pleaded they had not received the full amount due to them. The defendants urged they had purchased the property, and that the deed of sale was duly registered. Ramdhun Goon came in as a third

party, and set forth his mortgage, as did one Kalachand. The case was tried by the moonsiff of Busheerhaut, and the plaintiff's suit was dismissed: no appeal was preferred by either of the parties against this decision.

'The moonsiff dismissed the present plaint, upholding the deed of sale put in by the defendants, Ramdhun and Holodhur. The principal sudder ameen records his opinion, giving preference to the conditional sale and the mortgaged bond of the plaintiff, because of its being of a date previous to the sale made to the defendants, Ramdhun and Hulodhur, by the females. He admits both documents are proved; and his decision in favor of the plaintiff rests on the priority of their deed alone.

'I doubt much the legality of this decision. The authenticity of defendants' deed is established to the satisfaction of the principal sudder ameen: it is no where pleaded that defendants knew of any previous sale, or mortgage to another; and, under Clause 3, Section 6, Regulation 36 of 1793, the registration of their deed must invalidate any other deed executed prior, or subsequent to the registered deed. Now, the mortgage bond filed by the plaintiff was never registered, and his protest above alluded to is not sufficient, as stated by the principal sudder ameen, to secure his title. I admit a special appeal, in order to test the legality of the principal sudder ameen's decision.'

We are of opinion that the decision of the principal sudder ameen is defective, inasmuch as he has not recorded his judgment distinctly as to whether the defendants, Ramdhun Dey and Hulodhur Dey were, or were not, cognizant, at the time of their purchase, of the plaintiff's purchase previously, which, under the provisions of Clause 3, Section 6, Regulation 36 of 1793, was requisite. We therefore return the case to the principal sudder ameen for further investigation on the points indicated, with reference to which he will decide it on its merits.

THE 22D MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 235 OF 1846.

IN the matter of the petition of Mr. Thos. Kenny, filed in this Court on the 18th May 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of Jessore, under date the 14th February 1846; reversing that of the

moonsiff of Dhurumpore, under date the 30th May 1845, in the case of Shumsher Ali, plaintiff, *versus* the petitioner, defendant.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff sued for possession of a small piece of land, with mesne profits. The moonsiff dismissed the plaint. The principal sudder ameen, in reversing the moonsiff's decision, awards mesne profits and interest from a date antecedent to that mentioned by the plaintiff himself in his petition of plaint.

I admit the appeal; and remand the case, in order that the principal sudder ameen may correct his decision in the foregoing points with reference to the plaint.

THE 23D MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 70 OF 1848.

IN the matter of the petition of Neeloo Mulla, filed in this Court on the 13th March 1848, praying for the admission of a special appeal from the decision of Mynooddeen Sufdur, additional principal sudder ameen of 24-Pergunnahs, under date the 26th January 1848; reversing that of the sudder moonsiff of 24-Pergunnahs, under date the 6th September 1847, in the case of the petitioner, plaintiff, *versus* Anund Chundur Nag and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

This was a suit for the reversal of a summary decree obtained by the defendants, against the plaintiff, in the office of the collector. The moonsiff gave judgment for the plaintiff.

The principal sudder ameen, in reversing the decree of the moonsiff, says that it is proved that the plaintiff is in possession of the lands, the rents of which he has been called to pay.

This, however, is not sufficient to establish the correctness of the summary decree. The defendant's right to claim the rent must be established, and the case be considered with reference to the provisions of Section 10, Regulation 8, 1831.

I accordingly admit the appeal, and remand the case for re-trial by the principal sudder ameen in the manner above pointed out.

THE 25TH MAY 1848.

PRESENT:

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 164 OF 1845.

Regular Appeal from a decision passed by Mr. C. Mackay, Principal Sudder Ameen of Mymensingh, February 24th, 1845.

RANEE BHOOBUN MYE DIBEA, DECEASED, RAJAH HUR-
INDERNURAIN RAE, APPELLANT, (DEFENDANT,)

versus

THE COLLECTOR OF MYMENSINGH, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—J. G. Waller.

Wukeel of Respondent—Pursun Komar Thakur.

CLAIM for possession of 4 annas' Sreerambuttee and others, sold on the 6th July 1836 for arrears of revenue, and bought by the Government: suit laid at rupees 9,438, including mesne proceeds.

The case is thus stated by the principal sudder ameen, who decided it *ex-parte* on the 24th February 1844.

'The point to be decided in this case is, whether a dependent *talook*, created subsequently to the formation of the decennial settlement, is liable to be annulled on the sale of the estate to which it appertains for the recovery of arrears of Government revenue due therefrom, and the purchaser entitled to possession; and whether the *talookdar* is entitled to retain possession on payment of an equitable *jumma* to the purchaser.

'From an inspection of the copy of the quinquennial register, and the statement of *talookdars* in the Pookeria *pergunnah*, and the other papers on the file, this court is of opinion that the auction purchaser is entitled to obtain possession of the *talook* to which he lays claim on the part of Government (vide Section 30, Regulation 11 of 1822, and the precedents referred to in the decision of this court in the case No. 38 of 1844, decided 20th February 1845.)

'Order accordingly that a decree pass in favor of Government of the *talook* aforesaid against the defendant, with *wasilaut* thereon (less 10 per cent. the expenses of collections) from date of purchase to that of possession under this decree, with costs and interest on the same from this date, as well as interest on the *wasilaut*, which will be ascertained at the time of execution of this decree.'

From this decision an appeal is brought by the defendant, Rance Bhoobun Mye, who states that she had no intimation of

the suit having been brought against her,—having been very ill at the time of the issue of the notices. She now wishes to enter upon her defence, to which the plaintiff objects on the ground of her neglect to appear in the lower court.

The plaintiff's objection is good, and the defendant cannot now be heard, unless the notices are defective. The plea of illness is not in my opinion sufficient. The defendant was not a person of such a description as to render her personal agency necessary to enable her to carry on a suit in court : she is a person of wealth and family ; and her *mokhtars* and other agents might have acted for her in the usual manner. The correctness of the notices not being questioned, there is no alternative but to confirm the decision of the lower court. Order accordingly : costs against appellant.

THE 27TH MAY 1848.

PRESENT:

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 364 OF 1847.

Special Appeal from a decision passed by Mr. F. W. Russell, Judge of Hooghly, March 17th, 1847 ; reversing a decree passed by Raae Radha Govind, Principal Sudder Ameen, December 26th, 1845.

SONATUN MUDDUK, APPELLANT, (DEFENDANT) WITH
OTHERS,

versus

GUNGAGOVIND BISWAS, RESPONDENT, (PLAINTIFF.)

THIS case was admitted to special appeal, on the 1st July 1847, under the following certificate recorded by Mr. J. A. F. Hawkins:—

‘ The plaintiff had been charged by the defendants with forming one of a gang of dacoits, who had attacked the house of the defendants, and plundered it of property to some amount. The plaintiff was apprehended by the police and his house searched ; and, on investigation by the magistrate, he was committed for trial before the sessions court. He was acquitted by the session judge, the same Mr. Russell who has passed the decision from which the present appeal is preferred. On referring, however, to the monthly abstract of acquittals for the month of February 1845, I find the session judge recording that the prisoner was

acquitted for 'want of proof,' and that there were 'sufficient grounds for the commitment.' The plaintiff had, moreover, been previously convicted in two petty cases as appears from the judge's decision.

'Under these circumstances, I admit the special appeal to try the question, whether an action for damages will lie against the defendants by the plaintiff, on account of the unproved charge of dacoity abovementioned.'

As the plaintiff was committed to take his trial by the magistrate, who had the power both to make the commitment if he considered there were grounds for the charge and to punish the prosecutor if he considered it false, and as the session judge declared there were sufficient grounds for the commitment, we are of opinion that an action for damages for defamation cannot be sustained. We accordingly reverse the decree of the zillah judge, with costs against the plaintiff (respondent.)

THE 27TH MAY 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 217 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Mymensing, August 4th, 1846.

JANUBEE DASSEE, APPELLANT, (DEFENDANT,) WITH OTHERS,

versus

TARAMUNNEE CHOWDHRAIN, RESPONDENT, (PLAINTIFF.)

SUIT laid at 13,190 rupees.

The following decision of the principal sudder ameen shews the nature of this suit :—

'This is a suit to re-assess certain *mehals*, as per specification in the plaint, held by the defendants, and appertaining to the 4½ *anna* zemindary of *pergunnah* Sheyrapore, of which the plaintiff is proprietress of a 2 *annas*, 15 *gundahs*' share.

'The defendant, Janubee Dassee, in her answer, pleads that the *mehals* in question are her *mocurrurree talooks* on a permanently fixed *jumma*; that the same was granted to her *mowrus* by the ancestors of the plaintiff under *sunnuds*, and a *dowl-bundobust* (rent roll) in her possession; that, therefore, the present suit to enhance the rents of the *talooks* in her possession is inadmissible.

‘The question at issue in this case appears to me to be, whether the *talooks* in possession of the defendants are *mocurrurree* on a permanently fixed *jumma*, or whether they are not so; and, supposing the latter to be the case, is the plaintiff entitled to re-assess the same in accordance with the rates of the *pergunnah*?’

‘It appears to this court, that the defendants found their right to hold their tenure as *mocurrurree*, on a permanently fixed *jumma*, under a number of *sunnuks* (dates and number not stated in the answer) and a *dowl-bundobust*, dated 15th Falgoon 1191 B. S. The *dowl-bundobust* in question, and copies of three alleged *sunnuks* along with other documents, have been filed by the defendants; but these, in my opinion, avail them nothing:—*first*, because the originals of not one of the *sunnuks* have been produced, and the three copies filed embrace but a very small portion of the lands enumerated in the *dowl-bundobust*; so that even admitting their authenticity had been established in a court of justice, (but which the defendants have not shewn) yet the validity of these three *sunnuks*, which, as already stated, refer to but a very small portion of the lands specified in the alleged *dowl-bundobust*, could not, in my opinion, be taken as proof in support of the genuineness of that document. *Second*, from an inspection of the alleged *dowl-bundobust*, dated in *Phalgoon* 1191 B. S., I have no hesitation in asserting that the writing thereof is not of the age or standing it purports to be, viz. 61 years back also, that it is clear that the alleged signature of Rajchundur and Kishenchundur is the writing of one and the same individual, although they purport to be the signature of two zemindars, both of whom, it is not denied, were acquainted with reading and writing. In short, this document appears to me to be a *forgery*, in which opinion I am strengthened by the decree of Mr. G. C. Cheap, a former judge of this district, dated the 18th May 1837, filed in this case, and which was upheld in appeal to the Sudder Dewanny Adawlut in their *roobukarree* dated 31st May 1838, also filed in this suit.

‘On the foregoing grounds, I am of opinion that the defendants’ right to hold the *talooks* in dispute as their *moocurrurree* tenure, on a permanently fixed *jumma*, has not been established; and that, therefore, the plaintiff (having served the defendants with the necessary notice as prescribed by Section 9, Regulation 5 of 1812, as proved by the testimony of two witnesses) is entitled to a decree adjudging to her the right to re-assess the *mehals* in possession of the defendants, and specified in the plaint, as per *nerik* of the *pergunnah*, which is to be ascertained at the time of execution of this decree, less 20 per cent. *malikanah* and expenses of collection. Ordered accordingly, that a decree as above set forth pass in favor of the plaintiff against the defendants, with costs and interest thereon from this date.’

From the above decision the present appeal has been preferred by the defendant.

The principal sudder ameen has considered the case as involving merely the question of the validity, or otherwise, of a *mocurrurree* tenure; but it cannot be limited to this point. The former issue would have been the only one, had the plaintiff been a purchaser at a sale made for arrears of revenue; but other questions arise between the present parties to the suit.

The plaintiff has sued for a declaration of her right to assess the tenures at the *pergunnah* rates, on the ground that the defendants have paid rent at variable rates. The defendants plead grants at fixed rates, made by the ancestors of the plaintiff, and urge that the heirs are bound by their ancestors' acts.

The plaintiff has filed no proof to shew that the defendants have paid at variable rates; while, on the other hand, there is a mass of evidence (such as *jumma-wasil-baukee* papers, &c.) to shew that the defendants have for a great number of years paid at the rate mentioned by them, viz. rupees 1,332-3-2-3 per annum; and as it had not been shewn that they have ever paid more, it must be presumed that they have paid the same rent during their own and their ancestors' possession, from a period dating anterior to the decennial settlement.

The original *sunnuds* alleged to have been given by the plaintiff's ancestors have not been filed by the defendants, and copies of only three of them have been produced. The *dowl* of 1191 B. S. which has been filed, we concur with the principal sudder ameen in rejecting as unworthy of credit.

The evidence, however, upon which the defendants mainly rest, is the answer of Rajchundur Chowdhree, the ancestor of the present plaintiff, and former proprietor of the estate, to a suit instituted against him by some of his co-sharers. In that answer (filed on the 31st *Bysakh* 1216, or 14th April 1809,) he, with a view to lower the amount of mesne profits for which he was answerable to them, stated that as there were a number of *mocurrurree* tenures in the estate, the profits could not be calculated at the gross rental of the lands. The *mocurrurree* tenures forming the subject of this suit, are mentioned by him as among them. Now, this admission may not, *per se*, be binding upon the heirs. There is no doubt however, that had the ancestor granted a *pottah* at a fixed rent, it would have bound the heirs; and the admission comes as strong evidence in support of such a grant having been made.

Looking at the whole of the case and the facts which have been proved, the payment of a fixed rent for a series of years and the absence of all demand for any increase by the plaintiff's ancestors, to whom the zemindaree came in succession of four or five generations, we cannot but come to the conclusion that the defendants have held at privileged rates, in accordance with a contract made

with former proprietors of the estate, and that the plaintiff's claim to enhance the rates cannot be maintained. We accordingly reverse the decree of the principal sudder ameen, with all costs chargeable to the plaintiff (respondent.)

THE 29TH MAY 1848.

PRESENT :

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 463 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Moorshedabad, May 29th, 1848.

NUBKISHUN RAE, APPELLANT, (DEFENDANT,)

versus

INDURCHUND DOGUR, (PLAINTIFF,) RESPONDENT.

Wukeel of Appellant—Gholam Sufdur.

Wukeels of Respondent—Pursun Komar Thakur, Bunsee-buddun Mitr, and Rampran Rae.

SUIT for the recovery of rupees 19,734-1-3, principal and interest, due on a *kistbundee*, or bond payable by instalments.

The execution of the bond is admitted; but defendant pleads that of rupees 18,038-8, the amount of the bond, only rupees 15,721-1 is principal, and the remainder rupees 2,317-7, interest charged in advance; and that such a bond is illegal under Section 9, Regulation 15, 1793.

Witnesses were called on both sides, and the books of plaintiff's *kothee* were produced and examined. According to the books, the full amount of the instalment bond was due when the accounts were closed; and the principal sudder ameen being of opinion that defendant's allegation had not been proved, gave a decree in favor of plaintiff.

It was urged by plaintiff (respondent) in appeal, that even were defendant's allegation true, it would not affect the validity of the bond, inasmuch as it was not pretended that interest had been calculated at an illegal rate; and no further interest being chargeable on the instalments, it could not be said that any attempt had been made to evade the usury laws. But it is quite unnecessary to enter into this question; issue was joined in the lower court on the question of fact, and this Court has no doubt that the decision on that issue, in plaintiff's favor, was perfectly correct.

The appeal is dismissed with costs against appellant.

THE 30TH MAY 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 741 OF 1847.

IN the matter of the petition of Gournath Koonwur, filed in this Court on the 24th November 1847, praying for the admission of a special appeal from the decision of Mr. A. Smelt, judge of East Burdwan, under date the 7th September 1847; affirming that of the moonsiff of Samuntee, under date 11th June 1847, in the case of the petitioner, plaintiff, *versus* Goluck Chundur Goopt and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff instituted this suit to recover a deed of sale and other documents, stating that he had purchased a portion of land, sold in execution of a decree of court, in the year 1245 B. S., or 1838 A. D.; and that having on some occasion entrusted the defendants with those papers, they had never returned them.

The defendants, admitting that the purchase was in plaintiff's name, allege that they were themselves the real purchasers; and that plaintiff gave them an *ikrar*, or engagement, to the effect that he had no right to the property.

The lower courts have held that the *ikrar* has been proved by the evidence of two subscribing witnesses; and, consequently, have dismissed the plaint.

The case has not been sufficiently investigated. The plaintiff declares in his plaint, and offers evidence to the fact, that he has been in possession ever since the date of purchase. This evidence should have been taken and considered in connection with the evidence for the defence.

I accordingly admit the appeal, and remand the case for trial *de novo*. The judge will send the case back to the moonsiff, with instructions to proceed as above pointed out.

THE 30TH MAY 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 68 OF 1845.

*Regular Appeal from a decision passed by Mr. F. Stainforth,
Judge of Zillah Chittagong.*

OBHYCHURN SEIN, PAUPER, APPELLANT, (DEFENDANT,)

versus

THE SALT AGENT OF CHITTAGONG, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondent—Pursun Komar Thakur.

APPEAL laid at 9,545 Company's rupees, 11 annas, 8 pie, value of salt decreed.

The particulars of the case are recorded in the two following decisions ;—the first a decision (A) of the Sudder Dewanny remanding the case for fuller investigation ; the second the decision (B) of the zillah judge, from which the present appeal is preferred.

(A) ' The plaintiff claims the sum of rupees 16,966-10, value of salt embezzled by defendant, when salt *darogah* under him. The principal sudder ameen tried the case in the zillah, and decreed it. As, however, neither the *purthul* papers (*i. e.* memoranda of the weighing of the salt) are filed, nor the witnesses who were present been produced and examined, on which the claim wholly rests, the investigation is most incomplete, and the decision unsatisfactory. Ordered that the case be returned for the judge to try himself, after calling for the above evidence.'

(B) ' In this case the *first* point to be decided is, whether the *golahs*, Nos. 1 and 5, were under the care of the *darogah*, *mohurris* and weighman, or not. It appears that the *darogah*, *mohurris* and weighman, had given in a *kuboolleut* for the *golah* No. 1, and that under their care the *golah* was emptied of its salt. There is no *kuboolleut* for the *golah* No. 5, but there is a paper called a *golahjat* containing a statement of the quantity of salt in store, and signed by the *darogah*; and this is a proof that the *golah* was under the charge of the *darogah* and others.

' The *second* point to be decided is what quantity of salt was in these two *golahs*; and, if there was a deficiency, whether the *darogah*, *mohurris* and weighman are liable for it, or not. By the paper called *golahjat* and the *rekshees*, or receipts, it appears that

in the *golah* No. 1, on the 27th January 1837, out of 32,685 *maunds*, 2½ *seers*, original and surplus salt, 30,302 *maunds*, 12 *seers*, 12 *chittacks*, 1 *cutcha* were accounted for by sales and loss by drying; therefore 2,382 *maunds*, 29 *seers*, 7 *chittacks*, and 3 *cutchas* are remaining. For the sake of concealing this balance, the *darogah* forged false *rekshees*, or receipts, for 2,421 *maunds*, 38 *seers*; and, having been committed to the sessions, was convicted of forgery and embezzlement. With regard to the quantity of salt in No. 5 *golah*, it appears that Mr. Paxton, superintendent of salt, weighed the whole amount of salt, and found 1,152 *maunds*, 11 *seers*, 5 *chittacks* deficient. Out of the two *golahs* 1,535 *maunds*, 12 *seers*, and 3 *chittacks* were deficient as stated in the plaint.*

‘The defence set up is foolish :—*first*, it is said that the salt was unfairly weighed, but it appears that the *golah* No. 5 was weighed in the presence of Mr. Paxton, a respectable man, and in the presence of men appointed by the *mohurrir* and weighman*. There is no doubt of the correctness of the weight. The proof is this, that at the same time *golah* No. 2 was weighed by Mr. Paxton, and no deficiency was found in it. If the weighing was unfair, there would have been a loss in this *golah* also.

‘The *second* excuse is, that the parties are not liable to be charged with the surplus salt, and that they ought not to pay the price of the salt, according to the rate at which salt is sold at Nuraingunj; but these excuses are answered by the contents of their *kubooleents*. Besides which, the paper called *golahjat*, signed by the *darogah*, contains the account of both original and *surplus* salt; the excuse therefore is of no avail.

‘The *third* excuse is this, that 256 *maunds* of salt had by mistake been transferred from *golah* No. 1 to *golah* No. 2, and that information of this was given to the salt agent on the 24th of March 1837; but this is not proved. But if such information had been given, the defendants would have been able to produce an authenticated copy of it; and this day Obhychurn, defendant, presented a petition on plain paper, requesting that the *rekshees*, or receipts of *golah* No. 2, might be sent for to prove that an excess had been found in *golah* No. 2; but, from the contents of the *kubooleent* entered into by Obhychurn, it appears that if an excess is found in any *golah* it becomes the property of Government, and cannot be carried to his credit in the deficiency of another *golah*.

‘The only point remaining for decision is, out of the securities what bonds are binding. It appears that when Obhychurn, *darogah*, was appointed *darogah* of the sudder *ghat*, Jygapal Dut, Ikram

* It should be mentioned that the *darogah* declined to send his men to be present at the weighing.

Ali, Parbuttee Churn Ruhit, Uleechand, Mohummud Warish, and Essanchundur Canoongoe were his securities. In their bonds it is written, that if the *darogah* is appointed to any other place their bonds will be binding. It appears that when the *darogah* was changed from the sudder *ghat* to the *aurungs* of Nizampoor, the salt agent on the 10th September 1833, directed the securities to be sent for by degrees to authenticate their bonds. Out of them Essanchundur Canoongoe having authenticated his bond at Dacca, entered it; and in place of the other securities Ubdoolah, Afta-boodeen, Rajchundur, and Golukchundur Canoongoe, became his securities on account of *golahs* of Keoree Kalee, appertaining to the *aurung* of Nizampoor. If the salt agent had not sent for the former securities, and had not taken fresh securities, then certainly the former securities, viz. those who became the securities for the sudder *ghat*, by the terms of their bonds, would have been answerable; but since, with the exception of Essanchundur, none of the former securities came forward to authenticate their securities on account of the Keoree Kalee *golahs*, and the salt agent took other securities from the *darogah*, it is but just to exonerate the old securities, except Essanchundur. Out of the securities of Ram Huree, *mohurrir*, two of them, Bhyrubchundur and Rae Huree Sen, are dead; the heirs of Bhyrubchundur are Chundee Churn and Doorga Churn; and the heirs of Ram Huree Sen, are his wife, Bishnopreea, and Ramchundur, and Luckeechundur and Kishenchundur, his sons: and his other securities are Kishen Churn Dass, Jychundur Dass, Sudanund Dey, Domun Bhoea, and Jola Ali; none of these have defended the suit.

‘Out of the securities of the weighman, Ramcoomar, Sudanund, Taneezooden Ahmud and Suroop Chundur, heir of Brij Kishore, the last only, Suroop, filed a reply.

‘This day Nooruddeen, *wukeel*, presented a reply on the part of Essanchundur, but it does not appear proper to receive it at this stage of the case; for, from the time that the suit was filed to its termination in the principal sudder ameen’s court, he made no attempt to reply, nor has he been a party to the appeal to the Sudder Court.

‘According to the conditions contained in the *kuboolcuts*, it appears that the *darogah*, out of 16 *annas*, is liable to 9 *annas*; the *mohurrir* to 3 *annas*, and the weighman to 4 *annas*.

‘It is ordered that the case be decreed &c. &c.’

The main grounds of appeal are:—*first*, that the weighing was unfair, and all papers had been taken from appellant on first suspicion excited against him; *second*, that the *golah* No. 5 was not under him; *third*, that the deficiency in *golah* No. 1 was made up by the excess in No. 2, where it had been stored by mistake by the *molungees*, in consequence of the entrances being close to

each other; and, *fourth*, that he had no opportunity of questioning the superintendent on whose evidence the judge has relied.

The weighing has been proved fair and open, and appellant might have been present, or sent people of his own. The *golah* No. 5 was clearly under him, though not specified in his *kuboolent*, or engagement deed, for it was constructed subsequently. The excess in any *golah* is forfeited to Government by express agreement, to prevent exactions of salt from the *mohungees*: and as to the *fourth* plea, if appellant had wished to question the superintendent, and the judge had prevented him, he should have applied to this Court, having had plenty of time to do so. His pleas being invalid and dilatory, the appeal is dismissed, and the decision of the lower court affirmed. Costs payable by appellant.

THE 30TH MAY 1848.

PRESENT:

A. DICK, Esq.,
JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,
TEMPORARY JUDGES.

CASE No. 160 OF 1846.

Regular Appeal from a decision of Mr. C. Mackay, Principal Sudder Ameen of Zillah Mymensingh.

ZUMEEROODEEN KHAN AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

MESSRS. WISE AND GLASS, RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellants—Gholam Sufdur.

Wukeels of Respondents—Pursun Komar Thakur and Ameer Ali.

APPEAL laid at Company's rupees 5,834, 3 annas, 10 pie, on account of indigo plant destroyed by trespass of cattle.

MESSRS. DICK & HAWKINS.—The claim is founded on an alleged trespass by cattle, in number 125 to 150, from *Bysakh* to 10th *Assar* 1250 B. Æ., by which 506 *biggahs* of indigo plant were destroyed; and again a similar trespass in 1251 B. Æ., from *Bysakh* to the end of *Jeyt*, by which 594 *biggahs* of indigo plant were destroyed, in all 1,100 *biggahs* of plant. Estimated value 9,900 Company's rupees.

The defence denied both trespasses as manifestly absurd on the plaintiffs' own shewing; and accounted for the suit on the score of malice alone.

The principal sudder ameen on the faith of a report of a police *darogah*, desired by the magistrate to enquire into the truth of

a complaint preferred by Mr. Glass against defendants of trespass in 1250, and on proof of the lands in question having been under indigo cultivation in 1251 B. Æ., on perusal of an answer of the defendant, Zumeerooddeen, in a case in the *foujdaree* court, and the order of the magistrate fining him for trespass, decreed Company's rupees 5,834, 3 *annas*, 10 *pie*, out of the sum claimed 9,900 Company's rupees. Hence the present appeal.

It is quite incredible that the plaintiffs (respondents) should have allowed their plant to be trampled down and eaten by cattle to the extent alleged, day after day, during four and eight weeks in two successive years, without complaining to the *police thannah* close by, or making any attempt to pound the cattle, or in any way resisting trespasses so extensive and pertinaciously repeated. No complaint was preferred, even to the magistrate, till after the injury had been completed, and nearly every visible proof of it obliterated; and the complaint for the first trespass was unaccountably allowed to be dismissed on default.

In such cases of trespass, the party injured is bound to complain immediately and to institute his suit for damages without delay, and to take every means at the time of trespass to secure full and satisfactory evidence of the offence having been really committed, and the extent of damage done,—all of which he easily can, if he will. In the present instance, the only evidence the plaintiffs have adduced, are:—*first*, a report of a police *darogah* called for on a complaint preferred by plaintiffs in 1250 B. Æ., which they allowed to be dismissed on default; *second*, a sentence of 50 rupees' fine passed on one of the defendants for trespass in 1251 B. Æ., but of what nature is not stated; and, *thirdly*, a number of witnesses, who can testify to scarcely any thing specific on the two points at issue, the trespasses and their extent. The Court, therefore, deeming the proofs brought by plaintiffs to establish their claim insufficient, dismiss it wholly, reversing the decision of the principal sudder ameen. Costs of both courts payable by respondents.

MR. JACKSON.—I see no reason to doubt that the plaintiff has suffered loss by the damage done to his indigo crops by the defendants' cattle. In the first year he lodges a complaint at the *thannah*; and in the second he prosecuted in the criminal court, and obtained a conviction. But the evidence to the amount of damage done is far from satisfactory; so much so, that I find it impossible to discover from it to what extent his crops were injured, and to what sum he can consequently lay claim as re-imbursement. There is no want of positive assertion, but the statements of the witnesses are very improbable, and I do not believe them. I therefore agree with Mr. Dick in reversing the decision of the lower court.

THE 31ST MAY 1848.

PRESENT :

SIR R. BARLOW, BART.,

JUDGE.

PETITION NO. 7 OF 1848.

IN the matter of the petition of Gudadhur Doolooree and others, filed in this Court on the 18th January 1848, praying for the admission of a special appeal from the decision of the deputy commissioner of Assam, under date the 17th September 1847; reversing that of the principal sudder ameen of Kamroop, under date 3d August 1846, in the case of Sheikh Manollah Mistree, plaintiff, *versus* Gudadhur Doolooree and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The principal sudder ameen nonsuited the plaintiff. On appealing to the deputy commissioner of Assam, that officer entered into the merits of the case and gave judgment in favor of the appellant. The petitioner, being dissatisfied, preferred this application for admission of special appeal, upon the ground that, under the existing law, a decree could not be given in appeal, when the case was nonsuited in the court of first instance; and that the practice is to return a suit under such circumstances, with the view to have the documents examined and the evidence taken in the court in which the suit was originally instituted.

* Petition No. 301 of 1846,
Musst. Oomdut-o-nissa.

On referring to page 410 of this Court's decisions for the year 1847, I find a case* reported which corresponds with that now before the Court. The deputy commissioner should have returned the case for decision to the principal sudder ameen, as he was of opinion that his order of nonsuit was wrong, instead of disposing of it in appeal on its merits. Ordered that the case be remanded for investigation to the principal sudder ameen, through the deputy commissioner, to be disposed of accordingly.

THE 31ST MAY 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION NO. 100 OF 1848.

IN the matter of the petition of Surroop Chundur Bose and others, filed in this Court on the 6th April 1848, praying for the admission of a special appeal from the decision of the principal sudder ameen of zillah Dacca, under date the 29th December

1847; affirming that of the sudder ameen of that district, under date 24th January 1846, in the case of Sheikh Booddhoo and others, plaintiffs, *versus* Surroop Chunder Bose and others, defendants.

This application is founded on the fact, that in the suit instituted by the plaintiffs for the recovery of certain lands, there are no defined boundaries, and that the petitioners objected on this point in the lower courts, but to no purpose.

I find the fact to be as represented, so that execution of the decree of the lower court is impracticable. I therefore admit a special appeal, and remand the proceedings to the sudder ameen's court, who will, on the plaintiffs' application, permit them to file a supplementary plaint, defining accurately the boundaries of the land claimed by them, after which he will dispose of the case *de novo* on its merits.

THE 31ST MAY 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 301 OF 1842.

Review of judgment passed in the above case of Regular Appeal, in favor of Appellants, by Messrs. Reid, Dick and Gordon.

NUNDKOMAR RAEE AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

INDERMUNNEE CHOWDHRAIN AND OTHERS, RESPONDENTS, (PLAINTIFFS.)

THIS case was first decided by the Court, on the 19th March 1845. The judgment is to be found at page 65 of the decisions for that year.

A review of judgment was admitted by Messrs. Reid and Jackson, agreeably to the following certificate :—

‘ From the printed decision it appears, that it was not proved that any final adjustment of accounts between the parties ever took place. An attempt at adjustment was made in 1232 and another in 1236; on the failure of which, arbitrators were appointed, but they gave no award. The decision given by the Court calculates the period of limitation from 1232, although it

is distinctly specified that the adjustment of 1232 is not proved. Further, the Court observe that the business continued to be carried on in partnership until so late as 1237; the suit being instituted on the 30th *Bysakh* 1248.

‘Under these circumstances, we are of opinion that the principle of limitation was erroneously applied, and there was nothing to prevent a decision of the case on its merits. We therefore admit the review claimed.’

MESSRS. JACKSON AND HAWKINS.—We are of opinion that the law of limitation was erroneously applied to this case, on the occasion of the former judgment of the Court.

The partners in the business were the four brothers,—Jewun Kishen Rae, Hurree Kishen Rae, Raj Kishen Rae, and Gopal Kishen Rae.

The first mentioned had a 4 *annas*’ share; the second the same; the remaining 8 *annas*’ share was held jointly by Raj Kishen Rae and Gopal Kishen Rae. These parties are now dead, and have been succeeded by their heirs respectively; but, for the sake of convenience, we retain, in recording our opinion, the names of the original partners.

The plaintiffs, who are the heirs of Raj Kishen Rae and Gopal Kishen Rae, allege that a balance was struck in 1232 of the *mahajunee* era, which was signed by all the partners; that the business was carried on to the 11th *Assin* 1236, when another balance was struck; that then the settlement of the claims of the several partners was referred to arbitrators, who examined the accounts, but gave no regular award. The defendants deny the statements of the plaintiffs as to the out-turns of both years, and allege that the business was carried on to 1237: their witnesses say the same. The plaintiffs now sue for what they declare was due to them on the account of 1236, and not upon that of 1232. To say that the cause of action, in such a case, must be calculated from the year 1232, is tantamount to saying that, in the case of a closed trading concern, the time for institution of suit by one partner against another must be calculated from the closing of each year’s account, and not from the date of the final out-turn on the stoppage or cessation of the firm, which we are of opinion is contrary both to law and practice. The date on which the last balance was struck is, unquestionably, the time from which the period is to be calculated. But the facts of the case are decisive as to the incorrect application of the law of limitation as a bar to the plaintiffs’ suit. The plaintiffs are Raj Kishen Rae and Gopal Kishen Rae, against Hurree Kishen Rae. The account of 1232 shews a balance of 48,500-11-10-2 due by Jewun Kishen Rae to the other partners, viz. 4,188-3-6-1 to Hurree Kishen Rae, and 44,312-8-4-1 to Raj Kishen Rae and Gopal Kishen Rae; but nothing due to the last mentioned by

Hurree Kishen Raee. It is the account of 1236 which shews Hurree Kishen Raee to be in balance to Raj Kishen Raee and Gopal Kishen Raee. It is not easy to understand how the cause of action is to be calculated from 1252, when nothing was due by the defendants to the plaintiffs, and when, consequently, there was no cause of action at all.

In regard to the merits of the case, we fully concur with the principal sudder ameen that the balance has been satisfactorily established. The balance sheets of account have been filed, and proved by the evidence of the arbitrators, Goorooপুরshad Koond and Kasheenath Gûh, whose evidence is supported by that of the deputy collectors, Ramchundur Raee and Gourchundur Raee. The evidence for the defence, which is chiefly of a negative character, contains nothing to impeach their testimony.

It appears to us, that in the former judgment of the Court, the term 'adjustment,' which generally refers to something agreed to by the parties, has been used in a way calculated to mislead. In the petition of plaint, it is expressly stated that the account of 1236 was made by a *mohurrir* of the firm (the same Gourchundur Raee who has given evidence in the cause); that the defendants put off from time to time signing or acknowledging it, and that at length it was put into the hands of arbitrators appointed by the several partners. The plaintiffs do not sue for a settlement of accounts; but they sue for the balance which they assert would have appeared at their credit had a settlement taken place, as shewn by an account prepared by a person in the employ of the general establishment, and subsequently examined, tested, and proved to be correct by persons nominated by both parties to enquire into their respective claims. It appears to us that the claim is a very clear and simple one; and, as it has been established by good and sufficient evidence, a decree must pass for the plaintiffs.

We accordingly affirm the decree of the principal sudder ameen, and award to the plaintiffs the sum of Company's rupees 5,259-0-3, the amount sued for, together with interest thereon from the date of the principal sudder ameen's decree to this date, and interest on the consolidated sum from this date to the date of payment. The costs of both courts to be charged to the appellants. This over-rules the former judgment of the Court of the 19th March 1845.

MR. DICK.—On reading the *ikrar*, or agreement between the parties, it appears that the two persons in question were appointed arbitrators, not merely to test the correctness of the balance struck by the *gomashas*, but to apportion the respective shares of the partners of all property, real and personal, belonging to them, and to examine their mercantile transactions and cash book, and strike a balance. They never gave an award: and their appointment

shews that the balance struck by the *gomashtas*, on which plaintiffs found their claim, was never acquiesced in by the defendants ; nay was at the very time repudiated by them. Consequently, the Court very properly rejected it as inadmissible, and would not enter upon the alleged adjustment of 1232 B. Æ. on account of lapse of time.

The rejection of the alleged adjustment of 1236 B. Æ. (the ground of claim) as inadmissible, is a matter of fact and decided : therefore, in my opinion, not open to review according to the hitherto invariable practice of the Court ; for, if once the judgment on a matter of fact be open to review, without new evidence, it may be reviewed twice, and thrice, and so on *ad infinitum*, and no one decision can be a wit more trustworthy than another.

Had plaintiffs sued to have an adjustment of accounts and a balance struck, and shewn that transactions had occurred between the parties within 12 years of action, the case would have been very different ; and a question might have been raised, whether the law of limitation applied to items in the accounts of date anterior to 12 years from date of suit. It is, however, to be observed, that *merchants' accounts* are not excluded in our law, as they expressly are in the statute law of England.

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THE 1ST JUNE 1848.

PRESENT :

W. B. JACKSON and

J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

E. CURRIE, ESQ.,

EXERCISING THE POWERS OF A JUDGE.

*Regular Appeals from a decision passed by Ram Lochun Ghose,
Principal Sudder Ameen of Nuddeu, August 4th, 1847.*

CASE No. 491 of 1847.

OOJUL MUNNEE DASEE, APPELLANT, (PLAINTIFF,)

versus

JYGOPAL CHOWDHREE AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

CASE No. 511 of 1847.

JYGOPAL CHOWDREE AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

OOJUL MUNNEE DASEE, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—J. G. Waller and Bunsee Buddun Mitr.

Wukeel of Respondents—Pursun Komar Tagore.

MESSRS. HAWKINS AND CURRIE.—Suit for maintenance at the rate of rupees 500 per mensem, with arrears from *Bysakh* 1252, and a sum of money (rupees 5,000) for building and furnishing a house.

The circumstances are these. Bykunt Nath Pal Chowdhree had two sons, Neelcomul Pal and Muddoosoodun Pal : plaintiff is the childless widow of Muddoosoodun, who died before his father ; and defendants are the heirs of the other brother, Neelcomul Pal. Plaintiff states that after her husband's death, she continued to live with her father-in-law and brother-in-law, until the death of the latter, when his sons turned her out of the house. Defendants allege, that shortly after her husband's death (some 30 years ago) plaintiff went to reside with her father, and has continued to do so ever since.

The principal sudder ameen took a *bewustah* from the *pundit* of the division, which declares the widow, of a son dying before his father, entitled to a maintenance proportionate to the amount of the father-in-law's property. For reasons stated in the decree, he fixed 100 rupees per mensem as a fitting allowance for plaintiff, and decreed accordingly ; giving her arrears from *Bysakh* 1252, and disallowing the rest of the claim.

From this decision both parties have appealed. Defendants allege :—*first*, that plaintiff's claim has been already satisfied, by the payment of a sum of rupees 5,000 to her father on her account in the year 1228 B. S. ; *secondly*, that they are willing, nevertheless, to receive and maintain her, and that choosing to reside with her father, she has no legal claim against her husband's family ; *thirdly*, that the allowance made by the principal sudder ameen is excessive. Plaintiff, on the other hand, appeals on the ground that the allowance is inadequate.

In support of the first of these pleas, defendants have filed an *ikrarnameh*, said to have been executed by plaintiff's father, Rammohun Dey Chowdhree, on the 27th *Phalgun* 1228. The *ikrarnameh* acknowledges the receipt by Rammohun Dey of rupees 5,000, from the interest of which the expenses of his daughter, with a commission for himself, are to be defrayed ; and after her death the principal, with any unappropriated interest which may have accumulated, to be restored to Neelcomul Pal, or his heirs.

The principal sudder ameen has rejected this document, principally, it would seem, on the ground that it was not accompanied by a *forkhuttee*, or release, on the part of the widow. This objection appears to us of little force, considering that a Hindoo widow must always remain under guardianship, and that she could leave the house of her husband's family only for that of her father's. An acquittance from the person who would have to bear the charge of her maintenance, seems to be all that was necessary. The principal sudder ameen remarks also that the deed was written on plain paper : the defect, however, was remedied before it was produced in court, and it cannot now be objected to on that ground. There is nothing suspicious in the appearance of the document : it is supported by entries in account books produced by defendants, and by the evidence of several witnesses, one of them the writer of the deed. The same witnesses state that plaintiff has lived in her father's house ever since the death of her husband ; and if their evidence is to be credited, the fact of plaintiff having made no demand upon her husband's family for maintenance during all this time, a period of 25 years, affords the strongest presumptive evidence of her having acquiesced in the arrangement, so far as her consent was of any avail.

But even had we concurred with the principal sudder ameen in rejecting the *ikrarnamēh*, and the evidence of defendant's witnesses, the second plea urged by the defendants would, in our opinion, be sufficient to defeat the plaintiff's claim. The husband was never possessed of any property from which an allowance could be assigned to his widow. She is entitled merely to maintenance from her legal guardians, the members of her husband's family; and if she chose to withdraw herself from their protection, it would seem that, by so doing, she forfeits all claim upon them. In Macnaghten's principles and precedents, (Vol. II. page 112) the law on the subject is thus laid down:—'while the father and other relations of her husband exist, the residence of a widow in their house is declared to be obligatory on her; and the law does not contemplate any case of opposition to this rule.'

A decision of this Court (Oma Dibeea and others v. Kishen Munnee Dibeea, S. D. Adawlut Reports, vol. VII., page 271) was quoted by plaintiff's pleader in appeal, to prove that no penalty is incurred by a widow choosing to reside with the family of her father, rather than with that of her husband. But, in that case, the question at issue was whether a widow residing apart forfeits thereby her claim to succession; and it is very evident that a title to succession, which is a substantive right, is a very different thing from a mere claim to subsistence.

The plaintiff's *wukeel*, on being questioned by the principal sudder ameen, stated that there was no impediment to his client residing with her husband's family; and on the part of defendants it was stated, that they were quite willing to receive and support her. Her separation from them, therefore, must be considered as her own act; and in such circumstances, under the Hindoo law as above quoted, she can sustain no claim for maintenance against them.

We therefore reverse the decree of the principal sudder ameen, and dismiss the suit with all costs against the plaintiff.

MR. JACKSON.—The plaintiff, as widow of Muddoosoodun Pal, deceased, is admitted by the *pundit's bewusta* in this case to have a legal right to maintenance, under the Hindoo law, from the family estate. The objections raised to her claim are:—

First, that her father, by a contract with the head of the family, Neelcomul Pal Chowdhree, agreed to pay her the maintenance she was entitled to for life, in consideration of 5,000 rupees which was paid him by Neelcomul Pal. A document (*ikrarnamēh*) is filed to this effect and sworn to: it is from this inferred that she has forfeited her claim on the family estate.

Secondly, that by leaving her late husband's house and living with her father, she has also forfeited her right to maintenance under the Hindoo law.

On the first point I observe, that the plaintiff and her father deny the execution of the *ikrarnamēh* in question; but, admitting

it to have been executed, it appears to me to be binding only on those who were parties to it, viz. Neelcomul Pal and plaintiff's father. At the time it was executed, plaintiff is said to have been about 16 or 17 years old, and a widow; she was therefore, in my opinion, *sui juris*, and competent to exercise all the functions of an independent person. To render the document binding on her, her written consent was necessary. It is contended that Hindoo widows are not *sui juris*,—that they are entirely subject to, and dependent on their male relations. I do not admit this to be the case, inasmuch as I find Hindoo widows every day in the full exercise of independent functions, buying lands, and selling and entering into contracts of all descriptions. But, supposing that the plaintiff was dependent, and incapable of acting on her own account when this *ikrarnamēh* was written, it still appears to me that the contract was by no means binding on her. I cannot admit that her father could, by the receipt of 5000 rupees, deprive her of her right to receive a maintenance from her husband's family estate. I am the more clear on this point, because, supposing her father to withhold the maintenance he engaged to afford her under that agreement, she could not sue him under it. She has no legal claim for maintenance from her father; her claim is on the family estate. If the chief of that family make an arrangement with a third party to pay her that maintenance, she may receive it from that third party; but, if that party subsequently discontinue the payment, her remedy is not against him, but against the chief of her husband's family and against the family estate. Her father certainly had no authority to compromise her rights, nor had the chief of her husband's family any authority to relieve himself of her claim, by payment of a certain sum to a third person. In either case therefore, whether the plaintiff were, or were not, *sui juris* at the time of the contract, that document can in no way affect her claim.

Again, it is urged that although there is no written consent of the plaintiff to that arrangement, her consent may be inferred from the fact that she has for many years, since it was written, lived with her father and received from him the maintenance under the agreement. This she denies, and it is not in my opinion proved from what party she has received her maintenance during that time. Her father's house and the house of her husband's family are stated to be very near each other, so that it is probable she was often in both; but there is no direct evidence to shew that her father maintained her. However this may be, I do not think that her receiving a maintenance from her father for a time, deprives her of her right to claim it from her husband's family estate, on its being withheld by her father. On the first point, therefore, I come to this conclusion, that the contract, (*ikrarnamēh*) if good and genuine as between the parties to it, in no way affects plaintiff's claim. I do not give an opinion on the validity of that contract as between the individuals

who were parties to it, because one of them is not a party to this suit.

With regard to the second point, whether the plaintiff has forfeited her claim on her husband's family estate, by leaving the house of her husband's family and going to her father's, I observe that she admits she has now gone to her father's, in consequence of ill treatment in the house of her husband's family since the death of her father-in-law; but I do not think she has by this incurred forfeiture of her right to maintenance. Even by the strict letter of the Hindoo law, a widow may live in her father's house on failure of her husband's heirs;* but, in this particular instance, the chief of her husband's family, Neelcomul, admits that he agreed that she should live with her father; how then can he afterwards object to her doing so? In fact he has not only agreed to it, but has forced her to leave his house by withholding her maintenance, and making it payable to her by her father. This is his own statement; and even now he refuses to pay her maintenance, which has led to this suit. Where then could she live but in her father's house? This fact alone justifies her going to her father's house, and her doing so is strictly consistent with propriety. Even under the Hindoo law, I am satisfied that she cannot be held to have forfeited, by this compulsory act, any right to maintenance which she may have possessed before it. (See *Raneepriya v. Bungeeram* Case I, Macnaghten, vol. II, p. 109.)

I come now, lastly, to the consideration of the amount of maintenance to which plaintiff is entitled; and on this subject I think the principal sudder ameen has exercised a sound judgment in fixing it at 100 rupees a month. The family is wealthy, and there is evidence to prove that other female members of the same family have, as widows, obtained awards of maintenance at that rate by judgments of the Supreme Court of Calcutta. The defendants' counsel seeks to reduce this allowance, on the ground that, under the terms of the Hindoo law, widows should receive only a mere subsistence. The expressions of the *shasters* on this head, cited in Macnaghten, are that widows shall receive as maintenance 'each evening one *prastha*, 1½ seer of rice, and a new cloth every 3 months;' and afterwards 'mere food, and *old* garments which are *not tattered*.' This rule, however, has been set aside by repeated decisions of this Court, which has awarded a money allowance proportioned to the station in life of the parties, and the extent of the family property. Macnaghten also cites a text from *Vrihas-pattee* to the following effect, with reference to this very point of maintenance:—'A decision must not be made solely by having recourse to the letter of written codes; since if no decision were made according to the *reason of the law*, or according to immemorial usage, there might be a failure of justice.'

* See Macnaghten, p. 104, vol. I.

I conceive that the above text of Vrihaspattee, authorises the courts of justice to mitigate the rigor of the letter of the *shasters*, whenever the reason or spirit of them may appear to require it ; and this Court has apparently acted on this principle on some occasions, in awarding to widows a money allowance proportioned to the wealth of the family, and their rank.

The previous custom of restricting a widow's maintenance to the merest necessities of life, was evidently a part of the general system then in use of inculcating the necessity of the practice of *suttee*, and was directed towards the attainment of what was considered most desirable, viz. that the widow should suffer herself to be burned. To this end the state of widowhood, instead of being honored and respected, was made irksome, painful, and disgraceful. Widows were treated as persons who had failed in an important religious duty ; their portion in life was a bare subsistence embittered by contempt and neglect ; they were held entitled to the smallest possible quantity of the poorest food, and to the cast off garments of the rest of the family ; and their personal treatment was often such as to render life a burthen to them.

On the principle that *suttee* was a religious duty, such treatment was not unreasonable ; but it is now ascertained that the principle (of course I mean under the Hindoo law,) was erroneous. The rite of *suttee* has been declared a criminal act by Regulation 17, 1829 ; and the reason assigned in the preamble of that Regulation is, that the practice is neither incumbent nor enjoined upon widows by the Hindoo law ; on the contrary, a life of purity and retirement is held to be preferable. In fact, whatever may have been the origin of this cruel practice, there can be no doubt that its prevalence may be ascribed to the cupidity of the male relations of the deceased, between whom and the property the right of the widow intervened under the law of the Dayabhag. Wherever this law prevailed, that is throughout Bengal Proper, *suttee* was of continual occurrence ; while in Behar and Benares and Cuttack, where the rule of the Mritacshara was observed, which excludes widows altogether from inheritance, it was rare, evidently because the male relations had not the same direct personal interest in the destruction of the widow.

As the rite of *suttee* is criminal, and is not a religious duty under the Hindoo law, there can be no reason to continue the ill-treatment of the widows, which was only defensible as conducive to the performance of *suttee*, and in fact was adopted with that object. The proper object to be held in view, is to supply the widow with the means of passing her days in purity and retirement ; this being the rule prescribed by the *shasters*.

It is evident that old clothes and a short allowance of poor food are not conducive to purity, or to that tranquil and resigned state of

mind which would dispose a person to retirement from the world. It appears, therefore, to me, that this limitation of food and raiment is no longer applicable to our decisions regarding the maintenance of widows : on the contrary, they are entitled to such an allowance as will enable them to live in a manner becoming the position in life which they occupy, such as will ensure them comfort and respectful treatment. Where the family is poor, of course the allowance must be small, and where rich, larger in proportion. This would appear to be the principle applicable to all such cases, and which has been applied to them both in this Court and in the Supreme Court of Calcutta ; and, on this principle, I think the award of an allowance of 100 rupees a month in this case was just and proper. I would not interfere with the order of the lower court.

I have entered fully into the principle of decision in such cases, because I consider it to be a point of great national importance, on which the interests and welfare of many must depend.

THE 1ST JUNE 1848.

PRESENT :

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 83 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dacca, December 8th, 1846.

RANEE UNNOPOORNA DIBBEA, WIDOW OF RAJAH RAM-KISHEN RAE AND MOTHER OF HURISCHUNDUR, A MINOR, ADOPTED SON, APPELLANT, (DEFENDANT),

versus

NUND LAL DUT, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Gholam Sufdur.

Wukeel of Respondent—Pursun Komar Tagore.

CLAIM to set aside an *ijazutnameh*, or authority to adopt, and the adoption made under that authority : suit laid at rupees 12,800.

MR. JACKSON.—The plaintiff bought 2 *annas* and upwards of a patrimonial estate from the defendant, Ranee Unnopoorna, in *Assin* 1243, and obtained possession of it, which he still holds.

Three months after that sale, the Ranee adopted a son, Hurischundur, under a document giving her power to adopt, executed by her husband a short time before his death; the document is produced. The Rajah, Ramkishen, died in 1226. The plaintiff now contends that this document is a forgery, and that the adoption is illegal and void.

The defendant objects that the suit cannot be heard, as the plaintiff is not a member of the family, and is not competent to bring a suit to set aside an adoption in which he is not concerned. She also brings evidence to support the document in question.

On the 8th December 1846, the principal sudder ameen decided in favor of plaintiff; having, in the first instance, declared that the plaintiff was sufficiently interested in the fact of the adoption to authorize him to come into court to set it aside.

From this decision the defendant appeals.

It is not disputed that the property in question is part of the ancestrel property left by Rajah Ramkishen. His widow succeeded to the property with only a life interest; and, at the time of the sale of the share to plaintiff, she had not adopted a son. The right of the plaintiff to the property depends on the validity of the sale; and this validity is not affected by the subsequent adoption. I do not enter into the question of the validity of the sale, because that is not the point at issue in this case. The point at issue is the validity of the adoption and of the document empowering the Ranee to adopt, and the case is instituted solely to invalidate the adoption. But, in my opinion, the plaintiff has no interest in that matter; and his purchase would stand precisely in the same situation whether the Ranee's adoption holds good, or not. The validity of the sale in fact depends on the power of the Ranee to sell; and that power is not affected by her adoption of a son after the sale. The decision must therefore be reversed; and the plaintiff be nonsuited with costs, having sued to contest a point in which he is not a party interested.

Messrs. HAWKINS AND CURRIE.—The plaintiff alleges himself to be proprietor of a share of the estate left by Rajah Ramkishen, by purchase from his widow, the defendant. Shortly after the purchase, it seems the widow adopted a son; and plaintiff, conceiving his interests to be injured by this adoption, has brought suit to set it aside. Now, it is not apparent that the validity of the sale to plaintiff is necessarily affected by the adoption; and, on the other hand, it is certain that any other obstacles to the recognition of his title, (and such, as appears from the proceedings of the collector and revenue commissioner filed in the case, do actually exist), will not be removed by a decision for the legality or otherwise of the adoption. It is to be observed also, that such a decision would affect the possible rights of other persons, not parties to the suit, in the other moiety of the estate, with which

plaintiff has no concern. If plaintiff deemed it necessary to come into court, he ought to have confined himself to the matter in which he has a direct and immediate interest,—the establishment of the validity of the sale; and this he might, if he pleased, have put in issue, by bringing a suit to establish possession and enforce the registration of his name in the collector's office, which has been suspended. He has taken a wrong course in suing to set aside the adoption; and we therefore concur with Mr. Jackson in an order of non-suit, reversing the decree of the principal sudder ameen. All costs of both courts to be charged to plaintiff.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 435 of 1847.

*Special Appeal from a decision passed by the 3rd Principal Sud-
der Ameen of Zillah Chittagong, August 22d, 1845; reversing a
decree passed by the Moonsiff of Ishapore, February 20th, 1845.*

AMEERODDEEN, APPELLANT, (PLAINTIFF,)

versus

HAJRA BIBI, RESPONDENT, (DEFENDANT.)

Wukeel of Appellant—Abbas Ali.

Wukeel of Respondent—Rufeeooddeen.

THIS case was admitted to special appeal, on the 5th July 1847, under the following certificate recorded by Mr. C. Tucker :—

‘The petitioner (plaintiff) sued to compel the defendant to complete a sale of certain lands, which she had engaged to sell him for 140 rupees, of which she had received 100 in part,—giving a receipt for the same, in which she bound herself to execute a bill of sale for the property, provided the balance due of the purchase money, viz, 40 rupees, was paid within 15 days.

‘The moonsiff decreed for the plaintiff; but, on appeal, the principal sudder ameen, Moulvee Ashruf Ali, reversed the decision of the lower court, on the ground that such a receipt was not binding on the defendant; that she was at liberty to change her mind at any time before receiving the full amount purchase money.

‘I referred the question to our *cazee*, who declares the receipt to be binding on the defendant; and that if the money were tendered within the prescribed period, the defendant, under the Mahomedan law, was bound to complete the sale. I therefore admit the special appeal, as the case was thrown out by the lower court merely on the insufficiency of the receipt to bind the defendant.’

Under the circumstances related in the above certificate, we annul the decision of the principal sudder ameen; and remand the proceedings to that officer, with instructions to decide the question on the authenticity, or otherwise, of the receipt filed by the plaintiff.

THE 3D JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 137 OF 1845.

Special Appeal from a decision passed by Mohummud Idress, Principal Sudder Ameen of Furreedpore, March 30th, 1844; reversing a decree passed by Moonshee Aftabooddeen Ahmud, Moonsiff of that district, March 27th, 1843.

BUSHARUTOOLLAH MUJMOODAR, APPELLANT,

(PLAINTIFF,)

versus

SHEIKH MADAREE AND MOAZIM HOSEIN, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellant—Ameer Ali.

Wukeel of Respondents—Abbas Ali.

THIS case was admitted to special appeal, on the 6th of May 1845, under the following certificate recorded by Mr. C. Tucker:—

‘In this case the plaintiff having purchased a *talook* at a public sale, made for the recovery of arrears of revenue, sued one of the *ryuts*, who had executed a *kuboolout* to the plaintiff under Regulation 7, 1799, for arrears of rent, which was dismissed by the collector. The present suit was brought to reverse that decision. A decree in favor of the plaintiff was passed by the moonsiff; but, on appeal, the moonsiff’s decision was reversed by the principal sudder ameen on the grounds that Moazim Hosein, one of the defendants, held a *shikmee talook*, constituted before the decennial settlement, in the *talook* purchased by the plaintiff, which was not affected by

the sale, and that Sheikh Madaree, the other defendant, was a *ryut* of his.

‘On reference to the proceedings, it appears to me very doubtful, indeed, whether Moazim Hosein was not a joint proprietor of the *talook* at large, or, at all events, was equally responsible with the other recorded proprietors for any balance which might at any time become due to Government; and if so, as a matter of course, on a sale for an arrear of public revenue, his rights would fall to the ground. The principal sudder ameen has grounded his decision on a decree of this Court, passed by Mr. Lee Warner, Mr. Reid, and myself, under date the 11th September 1841, without seeing that the cases are not similar. I therefore admit the special appeal, to try whether Moazim Hosein’s tenure is of that description, which, notwithstanding the sale, will remain untouched and unaffected by such sale.’

This was a suit to recover balance of rent due on a *kuboolent* executed by the defendant, and the due execution of such *kuboolent* was the single point to be tried. Any person claiming a proprietary right in the land, in regard to which the *kuboolent* was given, is at liberty to sue to establish his claim; but, in this case, such a question should not have been entertained by the principal sudder ameen. We therefore annul his decision; and remand the proceedings, in order that the appeal preferred from the decision of the moonsiff may be disposed of in the manner above indicated.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 119 OF 1845.

Special Appeal from a decision passed by Mohummud Idress, Principal Sudder Ameen of Furreedpore, March 30th, 1844; reversing a decree passed by Moonshee Aftabooddeen Ahmud, Moonsiff of that district, April 26th, 1843.

BUSHARUTOOLLAH MUJMOODAR, APPELLANT,
(PLAINTIFF,)

versus

BUNGSHEE MAJEE AND KHOONKAR RUHUM ALI,
RESPONDENTS, (DEFENDANTS.)

THE facts and circumstances of this case are similar to those recorded in the certificate given in the preceding case (No. 137); and the decision passed is the same.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 118 OF 1845.

Special Appeal from a decision passed by Mohummud Idress, Principal Sudder Ameen of Furreedpore, March 30th, 1844 ; reversing a decree passed by Moonshee Aftabooddeen Ahmud, Moonsiff of that district, March 27th, 1843.

BUSHARUTOOLLAH MUJMOODAR, APPELLANT,
(PLAINTIFF,)

versus

SHEIKH JUKI AND TUMEEZOODDEEN, RESPONDENTS,
(DEFENDANTS,)

THE facts and circumstances of this case are similar to those recorded in the certificate given in the preceding case (No. 137); and the decision passed is the same.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 117 OF 1845.

Special Appeal from a decision passed by Mohummud Idress, Principal Sudder Ameen of Furreedpore, March 30th, 1844 ; reversing a decree passed by Moonshee Aftabooddeen Ahmud, Moonsiff of that district, May 13th, 1843.

BUSHARUTOOLLAH MUJMOODAR, APPELLANT,
(PLAINTIFF,)

versus

RAMZAN ALI AND GOWHUR ALI, RESPONDENTS,
(DEFENDANTS.)

THE facts and circumstances of this case are similar to those recorded in the certificate given in the preceding case (No. 137); and the decision passed is the same.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 116 OF 1845.

Special Appeal from a decision passed by Mohummud Idress, Principal Sudder Ameen of Furreedpore, March 30th, 1844 ; reversing a decree passed by Moonshee Aftabooddeen Ahmud, Moonsiff of that district, April 26th, 1843.

BUSHARUTOOLLAH MUJMOODAR, APPELLANT,
(PLAINTIFF,)

versus

KULLEEMOODDEEN FUKER AND ZUHOOR-O-NISSA,
RESPONDENTS, (DEFENDANTS.)

THE facts and circumstances of this case are similar to those recorded in the certificate given in the preceding case (No. 137) ; and the decision passed is the same.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 129 OF 1846.

Special Appeal from a decision passed by the Judge of West Burdwan, November 26th, 1844 ; reversing a decree passed by the Moonsiff of Burjoora, April 5th, 1844.

ROOPSOONDER RAE AND GOPAL CHURUN RAE,
APPELLANTS, (DEFENDANTS,)

versus

SOODA MOOKEE DASSEE AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

Wukeel of Appellants—Kishen Kishore Ghose.

Respondents—Defaulting.

This case was admitted to special appeal, on the 28th April 1846, under the following certificate recorded by Mr. C. Tucker :—

‘ In this case the plaintiffs sued the defendants for rent in kind, for the years 1241 to 1249 B. S., and the suit was dismissed by the moonsiff; but, on appeal to the judge, that officer declared the plaintiffs entitled to receive at a specified rate from the year 1250. I admit the special appeal, because this is not the point at issue between the parties. The judge should have given, or withheld what was sought to be obtained by the plaintiffs, and not given them something they did not ask for. The point is to reverse so much of the judge’s decree as awards what was not asked for.’

With reference to the above certificate, we remand the proceedings to the judge, with instructions to dispose of the appeal preferred to him on the claim made for the past period, viz. from 1241 to 1249 B. S., without interfering with the future rights of the parties, which cannot be adjudicated in this case.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 516 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, February 5th, 1847; reversing a decree passed by the Moonsiff of Gurhenee, August 24th, 1846.

SEETARAM RAE, APPELLANT, (PLAINTIFF,)

versus

MUNOHUR RAE, DEENDYAL, AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—E. Colebrooke.

Wukeel of Respondents—Ameer Ali.

THIS case was admitted to special appeal, on the 9th August 1847, under the following certificate recorded by Sir R. Barlow :—

‘ The plaintiff sues for reversal of the magistrate’s order, under Act 4 of 1840, dated the 17th March 1846; and for possession of 9 *biggahs* of land in village Bissembhera, *pergunnah* Nunnoor. He states he got a *pottah* of the lands, which had been given up by Deendyal and others, from the farmer, one Chooa Rae, on the 28th *Cheyte* 1250; and that Munohur, in collusion with Deendyal, ousted him, setting forth that he, Munohur, had purchased the rights of Deendyal in *Cheyte* 1252. *Foujdaree* disputes arose;

and plaintiff, in consequence, instituted this suit to recover possession.'

'The defendant, Munohur, put forth his right by purchase from Deendyal in 1252. The latter denied resignation of his tenure; stated he cultivated the lands in 1252 up to the time of his possession, and Munohur succeeded him in 1253.'

'The farmer, Chooa Raee, was not a party to this case; but was a plaintiff *versus* Deendyal, for balance of rent from 1248 to 1250, on 4 *biggahs* of the land now claimed; and also *versus* Raj Komar Raee for balance for the same period on the remaining lands claimed, in two suits disposed of by the moonsiff simultaneously, and also by the principal sudder ameen. In these suits, the farmer stated that he had given a *pottah* to Seetaram of the lands which had been cultivated by Munohur Raee and Rajkomar, in consequence of their resigning them. The moonsiff gave decrees, in favour of Chooa Raee in both cases, which, however, were reversed by the principal sudder ameen, who was of opinion that no balance was due by the *ryots* who were sued. Reference to these two suits is necessary to shew which of the parties, in the case now before the court, is supported by the farmer.'

'The moonsiff decreed possession and *wasilat* to the plaintiff on account of his dispossession by the magistrate's order, i. e. for the year 1253 *Fuslee*. He held that the *pottah* produced by plaintiff, and the deed of relinquishment signed by Deendyal and the other, also filed by him, and the evidence of numerous witnesses examined in the *foujdaree* court, as well as in his own, clearly proved plaintiff's right of possession; and that the farmer, Chooa Raee, made the lands over to him in succession to Deendyal and Rajkomar.'

'The principal sudder ameen reversed this decision *on this ground alone*, that as the amount balance alleged to have been due by the former holders, Deendyal and the other, was *not specified* in the deed of relinquishment, that document was not worthy of credit. The necessity of such insertion is not laid down by any law; nor am I aware of any rule declaring that, in the absence of such specification in a deed of the nature alluded to, such deed shall be, and be held to be invalid. I admit a special appeal, in order to try whether the objection taken by the principal sudder ameen to the deed in question is a legal one which invalidates the document, should it appear in other respects to be substantiated by requisite proof.'

The ground on which the principal sudder ameen has rejected the deed of relinquishment, put in by the plaintiff in the first instance, is not sufficient to support his order in favor of the appellant in his court. We therefore return the case for re-trial by the principal sudder ameen, who will decide it on its merits as above indicated.

THE 3D JUNE 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 425 of 1847.

Special Appeal from a decision passed by Chundur Seekur Chowdhree, Principal Sudder Ameen of Zillah East Burdwan, March 9th, 1847; affirming a decree passed by Nurhurree Seromoney Pundit, Sudder Ameen of the same Zillah, December 27th, 1841.

MUHARAJAH MUHTAB CHUNDUR BUHADOOR,

APPELLANT, (DEFENDANT,)

versus

RAM MOHUN BANERJEE, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—J. G. Waller, Ameer Ali and Nilmonnee Banerjee.

Wukeel of Respondent—Gholam Sufdur.

THIS case was admitted to special appeal, on the 9th September 1847, under the following certificate recorded by Mr. J. A. F. Hawkins:—

‘Certain lands were given in *putnee* by the defendant in this case, to Mr. Cheek, in the year 1242 B. S. He fell into arrears and his tenure was sold, and purchased by the plaintiff in the year 1243 B. S. After his purchase, he sued one Gudadhur Gosain for possession of certain lands in *mouzah* Bilsunni. The Gosain pleaded that the land was his *lakhiraj* property; and produced a decree of court, dated 6th April 1815, from which it appeared that 75 *biggahs* of land, as attached to the *putnee* tenure, had been sued for by a former *putneedar*, and declared by dismissal of his suit to be the *lakhiraj* property of Gudadhur Gosain. A deduction, however, of 72 rupees, 8 *annas*, was ordered to be made from the rent payable by the *putneedar* to the zemindar, as the proportion payable on this quantity of land. On 22d March 1840, the suit brought by the present plaintiff against Gudadhur Gosain was nonsuited, on the ground that the Muharajah had no power to include the *mouzah* in the *putnee* subsequently granted.

‘The plaintiff then brought the present action against the Muharajah for a deduction to the extent of 72 rupees, 8 *annas*, from the *putnee jumma*, and for refund of past payments in excess from 1243 to 1247 B. S. He obtained an *ex parte* decree in the lower court. The Rajah was admitted to appeal, and then set forth that he had

made a deduction to the amount of 72 rupees, 8 *annas*, in the *putnee* given to Mr. Cheek; and that the plaintiff now sought a second deduction for the same thing. The principal sudder ameen confirmed the decree of the sudder ameen; but it does not appear to me that he has sufficiently investigated this particular point.

‘I admit the special appeal to try, whether situated as the plaintiff is, as the purchaser of the rights and interests of the former *putneedar*, (Mr. Cheek) who does not appear to have urged the objection now brought forward by the plaintiff, and who entered into a fresh *putnee* engagement some time after the decree of 1815, he (plaintiff) can claim the remission he now seeks. I should add that this point is not expressly urged in special appeal by the Rajah, but it arises distinctly out of the record.

‘Should the Court be of opinion that he can claim the remission, and also that the plea of the Rajah, to the effect that the 72 rupees, 8 *annas* has already been deducted, has not sufficiently been investigated, the case will have to be remanded for further enquiry on this point.’

MR. TUCKER and SIR R. BARLOW.—It appears from the judgment passed in 1815, referred to in the above certificate, that Nundkishore Raee and Nittanund Raee obtained a *putnee talook* from the zemindars of *pergunnah* Bishenpoor in the Bengal year 1218, and that *mouzah* Belsunni was included in the assets on which the *jumma* was fixed, consisting of 75 *biggahs*, and rated at an annual *jumma* of rupees 72-8. The *putneedars*, on going to take possession of this village, found it in the occupancy of one Gudadhur Gosain, who refused to pay rent to the *putneedars*, alleging the village to be his rent-free tenure from a period antecedent to the decennial settlement. On this the *putneedars* entered a suit against Gudadhur, and the zemindars from whom they obtained their *putnee*, to obtain a reduction on their rent to the above extent of rupees 72-8.

It was established to the satisfaction of the court that the village had been held, for a very considerable period, rent-free, antecedent to the decennial settlement, and had never since been subjected to the payment of rent to the zemindars of the *pergunnah*. The court therefore decided that the zemindars had no right to assess the lands, and give them to the *putneedars*; and, accordingly, granted a reduction in the *putnee-jumma* to the extent mentioned (rupees 72-8), referring the zemindars to a suit against the *lak-hirajdar*, should they consider the rent-free title to be invalid.

In 1242 B. S., the present zemindar of *pergunnah* Bishenpoor granted to Doctor Cheek a *putnee-talook*, under the title of lot Sookomoypoor, consisting of 78½ villages, amongst which is one called Bilsunni. That gentleman held the *talook* but a short time; and, falling in arrears, it was sold in 1243 B. S., and pur-

chased by the plaintiff in this case, who, in the year 1245 B. S., entered a suit against this same Gudadhur Gosain to fix a rent on the lands in his possession in *mouzah* Bilsunni. He was nonsuited, however, on the 22d July 1840, on the production of the decree of 1815; the court remarking that, until the lands in question should be declared liable to the payment of rent by a decree of court, it was not competent to the zemindar to give them in *putnee* to any one.

On the 9th July 1841, the present suit was instituted against the zemindar for a reduction of rent on account of *mouzah* Bilsunni; the result of which is shewn in Mr. Hawkins' certificate.

The defendant did not appear in the sudder ameen's court, but was allowed to appeal; and, before the appellate court, contended that he had allowed the remission claimed, on the re-settlement of the *putnee*, and that the Bilsunni included in the plaintiff's *putnee* was not the Bilsunni referred to in the decree of 1815, but another village of the same name. But he failed altogether to prove this; and though the court was desirous of deputing an *ameen* to the *mofussil* to enquire into this point, and though the plaintiff agreed to defray the expense attending his deputation, the appellant finally declined to avail himself of such an opportunity to show that there were two villages of the same name. But the respondent put in three documents in the appellate court below, which are decisive on the point of the *mouzah* Bilsunni included in the respondent's *putnee* being the very Bilsunni referred to in the decree of 1815. These three documents are the notices issued by the appellant for the years 1250, 1251, and 1252, calling upon the respondent to pay the balance of rent due from him. In these notices, the *jumma* of the *putnee* is stated at rupees 895, being that which Mr. Cheek agreed to pay; and from this sum a deduction is made of rupees 72-8 on account of *mouzah* Bilsunni, agreeably to the orders of the court. Now it is obvious, that unless these rupees 72-8, were already included in the 895 rupees, the appellant would not have allowed the remission. This, therefore, we repeat, is decisive evidence that the Bilsunni included in the respondent's *putnee*, is the Bilsunni referred to in the decree of 1815.

Now, with regard to the first point mooted in Mr. Hawkins' certificate, whether such a suit as the present,—that is a suit for a reduction in the *jumma* of a *putnee talook*, after engagements have passed between the grantor and the grantee,—will lie or not, we are of opinion that no invariable rule can be laid down on that point; and that cases of the kind, when instituted, must be disposed of with reference to the peculiar circumstances of each case respectively; and, indeed, the present case supplies a very forcible illustration of the propriety of such a course. We concur in the opinion we find recorded by Messrs. Dick and Mr. Jackson, in

the case of Rajah Muhtab Chundur, appellant, *versus* Lal Mohun Banerjea, No. 191 of 1844, at page 168 of the monthly decisions for May 1847, (a case as similar to the present one, in all its principal features, as one case can well be to another) that 'a purchaser of a *putnee* tenure at a public sale succeeds to all the rights of a former incumbent, and, like him, is entitled to obtain possession of whatever was included in the original document by which the *putnee* was constituted; and whatever was included in that document, and is not made over to him, provided it was not stated at the time of sale to be disputed, forms a just ground for the reduction of rent.'

We agree also in the force of the remarks of the same gentlemen, in the same case, on the subject of the binding nature of the former decrees. In this case, the decree of 1815 (the then zemindar of the *pergunnah*, and the ancestor of the present appellant being a party to the suit) ruled that *mouzah* Bilsunni was in the rent-free occupancy of Gudadhur Gosain; and that it was not competent to the zemindar to assign the lands to another person, until he should prove in a court of justice that they were held under an invalid title, and thereby subject to the payment of rent. No appeal was preferred from that decision, nor has any suit been instituted to try the validity, or otherwise, of the rent-free title under which Gudadhur Gosain holds the village; nor has there been any attempt to prove that either the first incumbent, Doctor Cheek, or the purchaser of his right and title, the respondent, were cognizant of these circumstances, and still assented to the *jumma* fixed by the appellant on the *putnee*.

Under these circumstances, we can come to no other conclusion, but that the assignment of *mouzah* Bilsunni, as a rent-paying village to the *putneedar*, was a fraudulent attempt on the part of the grantor of the *putnee* to evade the decree of 1815; and we cannot countenance such an attempt by rendering it successful.

On the second point contained in Mr. Hawkins' certificate, we are of opinion that if the plea of the appellant has not been sufficiently enquired into, the blame lies altogether with the appellant himself, who had every opportunity afforded to him by the appellate court below to substantiate it, but failed to avail himself of them. We therefore dismiss the appeal with costs, and affirm the decree of the principal sudder ameen.

MR. HAWKINS.—I regret I cannot concur with my colleagues, for I cannot, under the circumstances, presume a fraudulent transaction on the part of the zemindar; and as Mr. Cheek has not been brought into court, it is impossible to say what negotiations took place between him and the Rajah on the occasion of his taking the *putnee* in 1242. The former *putnee* of Nund

Kishore Rae and Nittanund Rae ceased and determined by falling into the zemindar's hands, some time before Mr. Cheek entered into his contract. We must take it for granted that he made some enquiry into the assets of the *putnee* before he took it. Had he gone to the zemindar, and objected that certain of the lands were in the possession of others, the zemindar might, and probably would have said to him : ' these are the terms upon which I offer you the *putnee*, take it or not as you please ; but I can make no further remission, or strike out of the assets of my estate that which appears on my zemindaree roll as part of its assets. Take the lot as it stands, one village with another, if you will ; but I can make no alteration of terms.' Mr. Cheek took the *putnee* ; he did not, indeed, hold it long, but as long as he held possession of it, he offered no objections on the score of deficiency of assets. The purchaser, the present plaintiff, paid his rents for two years. He then brought his suit against Gudadhur Gosain ; he was nonsuited in July 1840. In July 1841, one year after the nonsuit, and six years after the date of contract with Mr. Cheek, he sues for a refund of surplus payments, and for a future remission of rent. I admit that the purchaser is entitled to the rights of the *putneedar* whose *putnee* he purchases ; but I doubt very much whether a *putneedar* is entitled to claim a refund of alleged surplus payments, and a future remission, six years after the date of his contract, he having, in the mean while, paid his rents to the zemindar without making any objection. There must be some period which, in such cases, implies assent to the contract ; and I am of opinion that a period of six years is quite sufficient to protect the zemindar from such claims as are advanced in the present suit. I do not consider it safe to presume fraud on the part of the zemindar, on the suit of the purchaser of the *putnee*, when no statement of fraud has ever been advanced by the party who actually entered into the contract. I would therefore have reversed the decree of the lower court.

In what I have said, I have supposed that the *putneedar* is entitled to sue for a remission of rent in the event of deficiency of assets. On this point, however, I think there is some doubt, as the ordinary remedy would appear to be a relinquishment of the contract, and not a breaking up of the stipulated rent.

THE 3D JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.

TEMPORARY JUDGE.

CASE No. 515 OF 1847.

Special Appeal from a decision passed by W. St. Quintin, Esq., Officiating Judge of Zillah Shahabad, November 21st, 1846; confirming a decree passed by Syud Munohur Ali, Principal Sudder Ameen, August 27th, 1846.

MOWLABUKSH RAE AND OTHERS, APPELLANTS, (DEFENDANTS,)

versus

SOOKHBASEE KOONWUR, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—J. G. Waller.

Wukeel of Respondent—None.

A special appeal was admitted in this case by Mr. Charles Tucker on the 3d August 1847, on the ground that the suit was barred under the provisions of Section 16, Regulation 3 of 1793; a suit for the same property, between the same parties (plaintiff and defendant being reversed) having been already instituted, and being still pending when this suit was instituted.

The suit is for possession of half the village of Koorooj with mesne profits, which the plaintiff claimed in right of her deceased husband, Dookee Rae, admitting the other half to belong to the defendants, Mowlabuksh Rae and Deega Rae. The village had heretofore been held as a rent-free tenure, but was resumed by Government, when a settlement of the entire village was made with the defendants. Disputes regarding possession arising, that point was decided summarily under Act 4 of 1840, in favor of Sookhbasee Koonwur, to the extent of a moiety of the village; and then Mowlabuksh brought a regular suit to reverse the summary award, and claiming the entire village. Sookhbasee Koonwur pleaded in reply, that she was entitled to half the village in virtue of her deceased husband, Dookee Rae. A decree was passed in favor of Mowlabuksh Rae, on the 19th November 1845, by the sudder ameen, which was appealed by Sookhbasee Koonwur. On the 7th,

March 1846, the judge, Mr. W. St. Quintin, affirmed the decision of the sudder ameen. The judge in his decree states, distinctly, the point to be adjudicated is whether Dookee Raee, the husband of the appellant, Sookhbasee Koonwur, did, or did not, possess the right to a moiety of the village Koorooj, and this question he determines in the negative.

On the 5th March 1846, just two days prior to the judge's decision against her, Sookhbasee Koonwur instituted the present suit, and obtained a decree in her favour from Syud Munohur Ali, the principal sudder ameen, on the 27th August 1846. This decision was affirmed in appeal by the judge, on the 21st November following; stating in his judgment, that 'a glance at the genealogical tree, the authenticity of which is not questioned by either party, shews that Dookee Raee, as the lineal descendant of Kunchun Raee, has a clear hereditary right to a half share in his estate.'

The principal sudder ameen in his judgment states, that the decree obtained in the sudder ameen's court, dated 19th November 1845, does not affect this claim, since the only point settled thereby was with whom the settlement was actually made. The judge makes the same observation. But it is not intelligible why both the judge and the principal sudder ameen refer to the sudder ameen's decision, when that decision was carried in appeal before the judge, by whose judgment the point at issue, and the question decided in that suit, should have been tested and ruled. What that point was we have already stated in the judge's own words; and we are of opinion it was correctly stated by the judge, and it could have been no other than that stated, viz. whether Dookee Raee, by right of inheritance, was entitled to half the village Koorooj, or not.

It must be remembered that Mowlabuksh was the plaintiff in the former suit, claiming the entire village of Koorooj, of which Sookhbasee Koonwur disputed his title to more than a moiety; and to such a claim Sookhbasee Koonwur had no resource but to shew a better title. Sookhbasee Koonwur's occupation of half the village had been affirmed by the result of the proceedings held under the provisions of Act 4, 1840; and Mowlabuksh sued to cancel that order, which could only be cancelled by establishing his right to the same. That suit put Sookhbasee Koonwur's right to half the village Koorooj in issue; and the same issue could not be tried in another suit between the same parties.

But as this has been done by the institution and disposal of the present suit on its merits, we annul the decision of both the lower courts, under the provisions of Section 16, Regulation 3, 1793; and, decreeing for the appellants, dismiss the claim of Sookhbasee Koonwur, with all costs in all the three courts against the respondent.

THE 6TH JUNE 1848.

PRESENT :

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 2 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, September 16th, 1845.

RANEE BHOOBUN MAYE, DECEASED, IN HER PLACE
RAJAH HURINDERNURAIN RAE, APPELLANT,
(DEFENDANT,)

versus

BHYRUB INDERNURAIN RAE, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—J. G. Waller.

Wukeel of Respondent—Pursun Komar Tagore.

CLAIM rupees 8,533, principal and interest of a sum of money paid by the plaintiff as Government revenue of 4 *annas*' share, *pergunnah* Pookeria.

The principal sudder ameen states the case as follows:—
'The plaintiff institutes this suit for the recovery of rupees 4,000, principal and interest thereon, as well as *batta* on Company's rupees, under the following circumstances. He states that the defendants took a *benamee ijara* of his 4 *annas*' share of *pergunnah* Pookeria, on a lease of nine years; and that in consequence of their allowing the estate to fall in arrears, it was advertised for sale, when the plaintiff, to rescue his property, paid up those arrears, a refund of which he now seeks to obtain from the defendants.

'The defendant, Rane Bhoobun Maye, who is the principal defendant in this case, admits taking the *ijara benamee*; but pleads that all sums due on this account have been already adjusted. However, no mention is made how, when, and with whom.

'The point for determination is, did the plaintiff pay up the arrears due on the estate in question, during the period the same was held in *ijara* by the defendants?

'The defendants have been unable to prove their plea of a settlement having been made with the plaintiff with regard to the present claim; whilst from a perusal of the copy of the collector's summary decree, dated the 25th January 1832, in the case of Tara Munnee and others, (the *wussee* of Bhyrub Indernurain) *versus* Rane Bhoobun Maye Dibbea, and the copy of the daily account filed under the signature of the deputy collector, dated 7th March 1831, it has been sufficiently proved that the arrears due by Rane Bhoobun Maye Dibbea, on account of this *ijara* for the Bengal

year 1238, were actually paid in by the plaintiff; and that therefore he is fully entitled to a decree of his claim, but only against the principal defendant, Ranee Bhoobun Maye. On these grounds I would pass a decree for the plaintiff against the said Ranee alone, releasing the other defendants therefrom.

‘ Order accordingly, that the claim be decreed for the plaintiff against Ranee Bhoobun Maye Dibbea, with costs and interest from this date; the other defendants to be considered exempt from this decree.’

From this decision the defendant appeals, urging that the suit is barred by reason of lapse of time,—the collector’s receipt for the money in question being dated 7th March 1831, whereas the suit was not brought till the 31st May 1845, or upwards of 12 years after.

The fact is not disputed, but the respondent pleads minority against the application of the rule, as he was not of age till 1842, and he sued in 1845. He is quite in time, if the plea of minority be admitted. It is true that he had a guardian legally appointed; but the neglect of the guardian to prosecute his ward’s claim, cannot be allowed to operate to the prejudice of the ward in regard to lapse of time. I think the principal sudder ameen has acted rightly in hearing and determining the case, and I see no reason to interfere with his decision: it is hereby affirmed with costs against appellant.

THE 7TH JUNE 1848.

PRESENT:

A. DICK, Esq.

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 173 OF 1846.

Regular Appeal from a decision passed by the Additional Principal Sudder Ameen of Zillah 24-Pergunnahs, Mynooddeen Sufdur.

MUSST. BISTOO SOONDREE, APPELLANT, (PLAINTIFF,)

versus

CAZEE GHOLAM, GAYASOODEEN, SHEIKH MOHUM-MUD RUHEEM, AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellant—E. Colebrooke and Gour Hurree Bose.

Wukeels of Respondents—Abbas Ali and Kishen Kishore Ghose.

SUIT laid at Company’s rupees 9,811, annas 13, gundahs 16, to obtain possession on 810 biggahs, 18 cottahs of land in Beel Buro-

tee; and appeal laid at Company's rupees 5,516, *amas* 11, portion of claim dismissed or 411 *biggahs* dismissed out of the 810 *biggahs* 18 *cottahs* claimed.

The plaintiff, appellant, founds her claim on the fact of the lands in question lying within a boundary of pillars erected by an order of court, in a case between her and one Biswas, a neighbouring proprietor. The said Biswas sued her, and collusively the respondent, Ghyasooden, for possession on 411 *biggahs* out of the 810 now in suit; and that while the suit was pending, Ghyasooden and Mohummud Ruheem trumped up a dispute and managed to get an order for possession from the *foujdaree* court, by means of which they took possession of the whole of the 810 *biggahs* and 18 *cottahs* now claimed. The defendants denied the claim.

The principal sudder ameen deputed his *sherishtadar* and another person to measure the lands claimed, and they made them out to be only 624 *biggahs*, 17 *cottahs*; out of which he decreed 399 *biggahs*, 18 *cottahs* to plaintiff, and 224 *biggahs*, 19 *cottahs*, 5 *chittacks* he declared to belong to defendants, for reasons detailed in his decision.

The appellant appeals, asserting her right to the whole of the lands claimed, and declaring the measurement of the *sherishtadar* to be collusive and false.

It is admitted by the respondents that the lands of appellant adjoin the land in dispute on three sides, and that on the fourth side is the boundary between appellant's *pergunnah* Huvellyshuhur and Anwurpoor; and the only ground on which respondents claim a right to any portion of the Beel Burootee, is the alleged fact of *peetulgolah*, or intermixture of patches of land of their and appellant's villages. This however they have totally failed to prove. The decision of the lower court is therefore amended, and the whole of the lands in suit decreed to appellant, with usufruct at 1 rupee per *biggah* yearly rent, after deducting 10 per cent. for expenses of collection from date of suit only, the appellant having failed to prove dispossession as asserted. Costs of both courts, in due proportion, awarded against respondents.

THE 7TH JUNE 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 839 OF 1846.

IN the matter of the petition of Ishwur Chundur Chuckerbuttee and others, filed in this Court on the 4th November 1846,

praying for the admission of a special appeal from the decision of Mr. C. Mackay, principal sudder ameen of zillah Mynensingh, under date the 4th October 1846; reversing that of Cazee Ousaf Ali, sudder ameen of the same zillah, under date 6th September 1845, in the case of Nubboo Komar Chowdhree and others, plaintiffs, *versus* Ishwur Chundur Chuckerbuttee and others, defendants.

This was a suit to assess, at *pergunnah* rates, that portion of the petitioners' dependant *talook* which is included in the plaintiffs' share of *pergunnah* Sheerpoore, on the ground of a variable *jumma*; in other words, that the rent heretofore payable by the petitioners and their predecessors varied according to circumstances, being in some years more, in some years less. The petitioners pleaded a *mouroosee mocurrurree jumma* of rupees 121-14 on their entire *talook*, under a *doul* and *sunnud* dated 13th *Phalagoon* 1187 B. S., or 23d February 1781, and denied that they ever had from that date to the present time paid more or less than that sum; and denied the plaintiffs' right to enhance the rent, they not being purchasers at a sale for the recovery of the arrears of Government revenue.

The sudder ameen dismissed the claim, going at great length into the details of the case.

The principal sudder ameen reversed the decision of the sudder ameen on two grounds:—*first*, he considered the *doul* and *sunnud*, bearing date the 13th *Phalagoon* 1187 B. S., not to be genuine.

Secondly. He considered the fact of the variable *jumma* paid by the defendants to have been sufficiently established by a certain petition presented to the collector of the district by Run Singh, ancestor of the defendants, dated 4th *Assin* 1208 B. S., a copy of which was filed in the case.

The question of the authenticity of the *doul* and *sunnud* is in this case a matter of no importance whatever. The existence of the defendants' *talook* was not called in question, was not a matter of dispute; on the contrary the plaintiffs acknowledged it, but claimed a right to enhance the rent heretofore paid by the defendant, on the sole ground that such rent had been variable at different periods, more at one time, less at another. This, and this only, was the point for investigation. The nature of the defendants' title, not the existence of it, was the point for enquiry; and though the *doul* and *sunnud*, if accepted by the court, might have strengthened the defendants' position, they would not have stood a moment against positive evidence of a variable or fluctuating rent. This then after all was the point on which the case turned, and in this case the *onus probandi* is with the plaintiffs.

Now with regard to this petition [the only document adduced by the plaintiffs in support of their plea of fluctuating rent during a period of upwards of 60 years] its sufficiency to establish such a plea was fully considered and weighed by the sudder ameen, who gives his reasons at length for rejecting it. But the principal sudder ameen has not recorded in his judgment one single reason for admitting it, or pointed out in what he considers the sudder ameen's argument erroneous or deficient. Considering therefore the principal sudder ameen's judgment incomplete, and founded on insufficient investigation, I admit the special appeal applied for, and remand the proceedings to the present principal sudder ameen of zillah Mymensingh, with instructions to enquire fully into the question of a variable *jumma*; giving due weight to the arguments of the lower court, and recording his reasons where he may see grounds for rejecting them.

THE 7TH JUNE 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 109 OF 1848.

IN the matter of the petition of Besakha Dyee, filed in this Court on the 14th April 1848, praying for the admission of a special appeal from the decision of Tarrakaunth Pundit, principal sudder ameen of zillah Cuttack, under date the 10th January 1848; reversing that of Mohummud Faroke, sudder ameen of the same zillah, under date the 7th September 1846, in the case of Besakha Dyee, plaintiff, *versus* Juggurnath Purshad Mullick, defendant.

This was a suit for 22 *battis* of land called Julpie, which the plaintiff claimed as appertaining to *mouzahs* Akinjurrah, Chumpie, &c., within her *talook* Choramim. The lands were in the occupation of the salt department, and the plaintiff states that the *molungees* paid rent for them to her husband, Brijkishore Canoongoe.

Kishen Munnee Dasee, the mother of the defendant, raising a dispute on the point of rent, the matter is stated to have been referred to the salt agent, who, the plaintiff says, rejected Kishen Munnee Dasee's claim, and referred her to the courts on the 15th February 1829.

Kishen Munnee Dassee accordingly instituted a suit for 30 *battis* of land, as appertaining to *mouza* Petao, &c. &c., in her *talook* Kishenpoorah. This case was still pending, when Birmanund Dass, deputy collector, came into the *mofussil* to make a settlement of Kishen Munnee Dassee's estate; and, in laying down the boundaries, he awarded 22 of the 30 *battis* to Kishen Munnee Dassee, and 8 to the plaintiff, on which Kishen Munnee withdrew her suit, and instituted a fresh one for the 8 *battis* awarded to the plaintiff; whilst the plaintiff brought the present suit for the 22 *battis* awarded by the deputy collector's proceedings to Kishen Munnee Dassee.

The *sudder ameen* went to the spot, and fixing a boundary between the plaintiff's and defendant's *talooks*, awarded the whole 30 *battis* to the plaintiff. Kishen Munnee Dassee appealed both cases; and the principal *sudder ameen* upheld the *sudder ameen's* judgment in regard to the 8 *battis*, but reversed it in regard to the 22 *battis* which he awarded to Kishen Munnee.

The principal *sudder ameen's* judgment is founded on no fixed principle. He admits that he cannot come to any conclusion on the evidence as to boundaries, and therefore he determines to give the land to the litigating parties according as it lies contiguous to, or at a distance from the other portions of their respective estates; and on this principle he awarded 8 *battis* to the plaintiff, and 22 to the defendant.

But the *sudder ameen* went to the spot, made a map of the disputed lands, and took evidence as to boundaries on which his decrees are founded.

All this is set aside by the principal *sudder ameen* without any satisfactory reason. Considering therefore the principal *sudder ameen's* decision incomplete, and founded on insufficient investigation, I admit the special appeal; and remand the proceedings to the principal *sudder ameen*, who will, after giving due weight and consideration to the arguments urged in support of his decision by the *sudder ameen*, record his reasons fully should he see reason to reject them, and dispose of the case on the evidence, oral and documentary, of the parties.

THE 8TH JUNE 1848.

PRESENT:

W. B. JACKSON and

J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

E. CURRIE, ESQ.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 150 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, December 8th, 1845.

JYKUNT CHUCKERBUTTEE AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

RANEE BHOOBUN MAYE AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellants—Pursun Komar Tagore.

Wukeel of Respondents—J. G. Waller.

CLAIM for rupees 9,873, value of grain taken away, and of rents collected from the *ryuts* of Bulrampore, &c., held by plaintiff in hereditary farm, and illegally appropriated by the defendants: instituted by Jynteea Dibeea and others, in the court of the principal sudder ameen of Mymensingh.

The following is the decree of the principal sudder ameen of Mymensingh, dated 8th December 1845:—

‘ Jynteea Dibeea and others, Plaintiffs,

versus

‘ (1) Ranee Bhoobun Maye, (2) Rajah Hurinder Nurain, (3) Kassiserry Dibeea, (4) Govind Purshaud Surma, (5) Bejoy Govind Surma, (6) Moteeoollah, (7) Nureekoollah, (8) Tureekoollah, (9) Kureemoollah, (10) Sheebnauth, (11) Juggernauth, (12) Shaekh Burket, (13) Imamdee, (14) Shaekh Keenoo, and (15) Radha Kanth, Defendants.

‘ This is a suit, laid at rupees 9,873, 9 annas, 9 pie, to obtain the amount price of various articles of grain, which the defendants are alleged to have attached and carried away from the *golahs* of the plaintiffs, as also for a return of the amount collected by the defendants (under an illegal attachment) from *mouzah* Bulrampore, the *mouroosee ijara* of the plaintiffs; the claim is made for a period of thirteen months, from *Joist* 1250 to *Joist* 1251 B. S.

‘The defendants 1, 2, 3, 4, and 5 answer in one petition. They admit the attachment, and collection of rupees 1,132, exclusive of rupees 125 paid to the *surburakar* for salary and expenses; but state they did so, in consequence of non-payment of rents due to them from the plaintiffs. They, however, deny *in toto* the attachment of, or making away with, any grain belonging to the plaintiffs; and with respect to the amount which they collected from the *mouzah* in question, they urge having credited the same to the sum due to them from the plaintiffs on account of arrears of rents.

‘The defendants 6, 7, 8, and 9 reply together, and plead as above.

‘The defendants 10, 11, 12, 13, 14, and 15 answer together, which is, in substance, an admission in every respect of the claim made by the plaintiffs; with this difference, they state that *not they*, but the other defendants are liable for the claim made,—the grain and amount collected having been delivered to them.

‘This case came on for final hearing this day, when it appeared that the following were the points for decision:—*first*, is it established that the plaintiffs had the grain, the price of which is claimed, in store; and, if so, what proofs have they adduced that the defendants attached and made away with the same?’

‘*Second*. What are the proofs of the defendants having collected the amount claimed from the *mouzah* in question,—the which, beyond the sum admitted in the answers (of the defendants 1, 2, 3, 4, and 5,) they deny having realized?’

‘On the 12th August last, a hearing was given to this case, and the depositions of 11 witnesses on the part of the plaintiffs, and 6 on the part of the defendants were perused; but the proofs adduced on the part of the plaintiffs not appearing to be sufficient, or conclusive, an *ameen* was ordered to be sent to the spot to enquire and report upon the subject matter of complaint. The *ameen* deputed having submitted the result of his enquiry, the case is now taken up for final orders.

‘The *ameen*, in his report now before the court, on the strength of the witnesses deposed before him on the part of the plaintiffs, considered their claim with regard to the first point established, less rupees 104, 3 *pie*; and with regard to the second, also established, less rupees 1,325. However, the view taken by this court, is opposed to that of the *ameen*. In the first place, the witnesses brought forward to establish the carrying away of the various articles of grain, speak with *such minuteness of the quantity, quality, and description*, that it is utterly impossible to believe them, or to suppose that they are doing otherwise than they have been tutored to do by the plaintiffs. Further, in a district like this, where the most trivial complaints are laid before the criminal courts, it is not probable, in a matter of such importance (amounting to some

thousands of rupees), that the plaintiffs would have refrained from petitioning that court, which, in this instance, they have not done ; and, therefore, with regard to the first point, I consider the claim of the plaintiffs as not established.

‘The *dakhillas*, on which the *ameen* considers the second point established, do not appear to me to be worthy of reliance. First, because they are not in the usual form of *dakhillas*: these are invariably given to *ryuts* on the dates on which they make each payment, and as often as they make payments they receive separate receipts. But those produced are not such: they purport to be for payments made on several dates, and yet they are all given on one *dakhilla*; and what is more, these *dakhillas*, which amount to several hundreds, instead of bearing various dates (for it is not to be supposed possible that sums from numbers of *ryuts* in various parts of the villages) are confined to two or three dates, a great part of which appears to me to be lately written with the view of giving support to the claim. Whilst numbers, some of which I have marked A, are clearly shewn to be altered in their dates: these either were for former years, or bore dates of other months, but have been changed to their present dates to support the present claim. That some of the *dakhillas* are genuine, I have no doubt; and that some portion of the claim is founded on truth, I believe. But, when so much falsehood is mixed up with a small sprinkling of truth, it is not only difficult, but impossible to separate the two; and, therefore, the unsuccessful issue of their claim rests entirely on themselves. Not deeming the claim established, for the reasons above assigned, I dismiss the same with costs.

‘Order accordingly, claim dismissed, the plaintiffs paying all costs.’

From the above judgment the present appeal has been preferred. We concur with the principal sudder ameen in rejecting the evidence in regard to the carrying off of the grain; and we further observe, in regard to the probability of the plaintiffs applying to the criminal court had the plunder of the grain actually taken place, that they did apply to the magistrate, when the defendants in the legal exercise of their power brought the farm under attachment.

In regard to the receipts for rent, we do not concur with the principal sudder ameen that they are to be rejected, because payments of various dates are written on the same paper,—this being the practice in some estates. In addition, however, to his other reasons for rejecting them, we cannot find any thing upon the record which connects the defendants with the receipts, with the exception of those granted by their own collecting officers. The great majority of them were given by persons employed in making

the collections for the plaintiffs before the farm was attached ; but there is nothing to shew that these persons were authorized to collect and grant receipts on the part of the defendants, after the attachment had taken place. In fact, there is every appearance of their having been prepared in collusion with the plaintiffs.

We accordingly affirm the decree of the principal sudder ameen, with costs of both courts against the plaintiffs.

THE 8TH JUNE 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 226 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of 24-Pergunnahs, August 6th, 1846.

MUNNEE MOHUN MUNDUL, APPELLANT, (PLAINTIFF,)

versus

MODOSOODEN MUNDUL, RESPONDENT, (DEFENDANT.)

Wukeel of Appellant—Gholam Sufdur.

Wukeels of Respondent—J. G. Waller and Bunsee Buddun Mitr.

THIS suit was instituted by the plaintiff, on the 9th September 1845, to recover from the defendant damages to the extent of one *lakh* of rupees, for injury done to the plaintiff in consequence of a false charge of assault and plunder of the nature of a dacoity, preferred by the defendant, which led to the apprehension of the plaintiff.

The plaint sets forth, that the defendant preferred a charge to the police that the plaintiff had attacked his *kutcherree-baree*, or office, with a body of men, and carried off property to the extent of 70 or 80,000 rupees, together with numerous papers,—the attack partaking of the nature of a dacoity, or gang-robbery.

The charge was made, in the first instance, to the officers of a subordinate police station not far from the spot. That on the arrival of the police *darogah*, to whom the complaint had been forwarded, the defendant reduced the extent of the property carried off to 3 or 4,000 rupees in cash, and some articles ; that the *darogah* reported to the magistrate that the charge was without foundation. That the magistrate sent for the parties through the police ; and, after investigation, dismissed the claim, fining the prosecutor (defendant) 200 rupees for preferring a false and groundless complaint. The plaintiff now sues for damages on account of the imputations upon his character, and of the injury

sustained by him by his apprehension by the police. This last point is not quite clear from the concluding part of the plaint; but, as the fact of the arrest is set forth in the body of the plaint, I take it as if the plaintiff is suing on both grounds.

The defendant pleads that the plaintiff has greatly exaggerated the charge as originally preferred by him (defendant); that he is prepared to prove and justify all that he alleged against him; and that the plaintiff and other members of his family have been repeatedly convicted of riot, assault, and other such offences, so that he cannot be injured in character by any such charge as that preferred by him against the plaintiff.

The principal sudder ameen, for the reasons stated by him in his decree on the 6th August 1846, gave judgment for the defendant, and from his decision the present appeal has been preferred.

It appears that on the 11th *Sawun* 1252 (July 1845), the defendant submitted a complaint to the police *zemadar*, stationed at no great distance from his dwelling, charging the plaintiff with having entered his office with a body of 20 or 25 armed men, abused him for befriending one Ramnee Dassea, with whom the plaintiff was at variance, and plundered cash, &c. to the value of 70 or 80,000 rupees, together with numerous papers belonging to him. The *zemadar* went to the spot, and afterwards forwarded the complaint to the *darogah*, who arrived at the defendant's place on the 15th *Sawun* for the purpose of enquiring. The defendant gave a similar statement to the *darogah*, except that on enquiring he had found his account of the property carried off to be exaggerated,—the real extent of it being about 3 or 4,000 rupees in cash, besides other articles. The *darogah* reported to the magistrate that, on enquiring, it appeared to him the accusation was not a true one, and consequently he did not send in the parties.

Up to this point the plaintiff had not suffered personal injury by arrest, in consequence of the charge preferred against him.

The magistrate, however, ordered the parties to be sent in to him, which was done; and on the 5th August 1845, the case was dismissed, and the prosecutor (defendant) fined 200 rupees for preferring a false charge.

On the 9th September following, the present suit was instituted.

The defendant, among other things, pleads as a bar to the action that the magistrate having fined him, it is not open to the plaintiff to sue him for damages in a civil court. I do not consider this to be a good plea. The magistrate's order might have gone far to clear the plaintiff's character, if attacked as stated; but it afforded him no redress for personal injury by arrest upon a false and malicious prosecution, supposing such to be established.

In the petition of plaint, the charge made by the defendant to the police is much exaggerated. The plaintiff introduces the term

'dakoity,' or gang-robbery, which was not used by the defendant. The charge would rather appear to have been to the effect that plaintiff came for the purpose of assaulting and punishing the defendant for befriending Ramnee Dasse, and that the plunder by the followers of the plaintiff was the work of the moment.

This is a very different thing from what is known to our regulations as 'dakoity,' or gang-robbery.

Stript then of the additions with which the plaintiff has set it forth, the charge was one of assault and plunder. In a somewhat similar case (that of Ram Taruk Sawunth and others v. Gholam Ali and others, page 115, vol. VII., Adawlut Reports,) an opinion was expressed that 'such a claim is admissible only on clear and satisfactory proof of the charge having been preferred in the *fouzdaree* court, wilfully and maliciously, against a person of unblemished reputation, with the avowed motive of harassing and annoying him.' I take it for granted, that this remark applies only to the claim for damages for injury done to character by a false charge; for, whatever a man's character may be, he is not to be subjected to arrest and imprisonment on false and unfounded charges. If the present case, as far as the slanderous and libellous part of it is concerned, be tried with reference to the opinion expressed in the case above cited, the claim must fall to the ground; for the defendant has filed copies of convictions of the plaintiff in two instances,—in the one for riot, assault and wounding, dated 8th April 1843; and the other for assault and false imprisonment, dated 23d May 1845, or only two months before the charge which has given rise to the present suit was preferred.

The defendant, however, pleads a justification of the charge; and the question has been raised whether the order of fine by the magistrate is not a bar to such plea. I am of opinion that it is not. In such cases the proceedings of the criminal courts are admissible as evidence, and there may be instances in which those proceedings would be conclusive in guiding the judgment of the court; as in the case of Sonatun Muduk *versus* Gunga Govind Biswas, recently decided by the court, it was held that after a commitment by the magistrate, and an expression of the opinion of the sessions court that the commitment had been made on sufficient grounds, an action for damages for a false charge could not be sustained. In the present case, the magistrate's order, inflicting a fine on the defendant for preferring a false charge, is strong evidence in favor of the plaintiff, but it is not conclusive; nor can it prevent the defendant pleading a justification, or the civil court receiving evidence on that point. Both parties have given a good deal of evidence bearing upon this plea: the plaintiff to prove an *alibi*; the defendant to shew that the assault actually took place. After carefully considering the whole, I cannot concur with the

magistrate that the charge was altogether false. On the contrary, I am of opinion that the defendant had ground for the charge which he preferred to the police. Looking at the case in all its features, and bearing in mind that the expense of a suit is in proportion to the amount at which the action is laid, and that the expense of the defence falls heavily in the first instance upon the defendant himself, I cannot but come to the conclusion that the plaintiff, who calls himself a wealthy zemindar possessed of some *lakhs* of property, has instituted this suit, and laid his damages at the grossly exaggerated sum of a *lakh* of rupees, for the purpose of harassing his adversary.

I confirm the decree of the principal sudder ameen, with costs of both courts against the plaintiff.

THE 13TH JUNE 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 62 of 1848.

IN the matter of the petition of Ramanund Surma, filed in this Court on the 9th March 1848, praying for the admission of a special appeal from the decision of Mr. T. Wyatt, judge of Rungpore, under date the 9th December 1847; reversing that of the principal sudder ameen of Rungpore, under date the 25th April 1846, in the case of the petitioner, plaintiff, *versus* Bowaneepurshad Raee and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The following is the judge's decision in this case.

' This suit was instituted for the recovery of one-third possession of a *jote*, situated in Atteabaree and other *bhitas*, *pergunnah* Baharbund, *turuf* Nowasee, assessed with a yearly *jumma* of rupees 513, which was sold by the collector in execution of a summary decree awarded by him, and purchased by Gooroorpurshad Raee, *mookhtar* of Bowaneepurshad Raee, farmer of *pergunnah* Baharbund, who sold it to Ghunnesh Bharuthee, *gooroo*, or priest of the appellants.

' The action is brought to set aside that sale, on the score of illegality,—the collector having fixed the sale for the 20th March 1838, which he postponed to the following day, without having caused the postponement to be inscribed on the original sale advertisement, over the *jote* to be sold.

' The principal sudder ameen decreed in favor of the plaintiff, considering the omission stated to have been made by the collector.

‘ From this decision an appeal is preferred, on the grounds that the plaintiff was not recognizable as a joint sharer, as frequent summary decrees had been awarded without his being included in those decrees, or in the present one, and because his name had not been registered in the zemindary *serishtā*. Moreover, the principal sudder ameen called for no proof as to the omission, or not, of the insertion of the postponed sale in the original advertisement.

‘ On reviewing the proceedings, it appears that, by the *lotbundee* of the 21st March 1838, the collector sold the rights and interests of Nundoo Lal and Goureenath Surma in the *jote* (the yearly *jumma* of which is rupees 555-12-2), put up to sale for the arrear of rent decreed on the 8th January 1838 against these persons, and not the plaintiff, in favor of Bowaneepurshad Raee, the farmer; hence the plaintiff could not sue for the annulment of the sale on the score of injury to his right as a joint sharer, a partnership which he had not made known before, or at the time of sale. For this reason, his plaint ought to have been dismissed. If his share, recognized by a decree of court, has been infringed upon by the purchaser, he has his action against him. The appeal is therefore decreed with costs, and the order of the lower court reversed.’

The prayer of the plaint is, that the sale being reversed, the plaintiff might recover his share with mesne profits. Now, it was not necessary to dismiss the plaint on the ground given by the judge. The plaintiff sued for possession of his share, as well as for reversal of the sale; and if the judge did not consider the sale liable to reversal, still there was no obstacle, under the common practice of awarding a portion of the claim, to his giving to the plaintiff a decree for his share, on proof of the same.

I accordingly admit the appeal, and remand the case for trial on its merits.

THE 13TH JUNE 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 79 OF 1848.

IN the matter of the petition of Jugroop Singh and others, filed in this Court on the 23d March 1848, praying for the admission of a special appeal from the decision of Syud Mohummud Khan, acting principal sudder ameen of Tirhoot, under date the 31st December 1847; reversing that of the sudder ameen of Tirhoot, stationed at Monghyr, under date the 23d January 1846, in the case of Mussamut Bhogoo and others, plaintiffs, *versus* the petitioners, defendants.

It is hereby certified that the said application is granted on the following grounds.

This was a boundary dispute between the parties, who are proprietors of neighbouring villages. The moonsiff decided in favor of the defendants; the principal sudder ameen in favor of the plaintiffs.

A similar dispute between the proprietors of the same villages was settled by arbitration in the year 1213 F. S. The award was filed, and the principal sudder ameen appears to have endeavoured to ascertain what it settled. He proceeds, however, upon a local enquiry made by himself as to the proper boundary, without making any reference to the examination of one of the arbitrators who is still alive, and whose evidence was taken.

The issue in this case is a very simple one. There can be no departure from the arbitrator's award, and the arbitrator who is alive must be consulted in regard to the boundary line by himself and colleagues.

I admit the appeal, and remand the case. The principal sudder ameen will not enquire what in his judgment may be the proper boundary; but what was the boundary laid down by the arbitrators; and, having ascertained *that*, he will proceed to pass judgment in conformity therewith.

THE 13TH JUNE 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

PETITION No. 244 OF 1846.

IN the matter of the petition of Pearee Lal and others, filed in this Court on the 21st May 1846, praying for the admission of a special appeal from the decision of Mr. J. French, additional judge of Tirhoot, under date the 27th February 1846; affirming that of the principal sudder ameen of Tirhoot, under date 11th July 1843, in the case of the petitioners, plaintiffs, *versus* Gopal Sahee and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The following is the decree of the additional judge in this case.

'This case was for the recovery of Company's rupees 3,200, being the principal and interest of advance made on a farm of entire village Buhar Basdebpore, *pergunnah* Treesut. The advance was made by Purshad Chowdhree, the father of the plaintiff, to Lalloo Singh Rae and others, principals, and Karee Rae, the attorney on the part of Jye Singh Rae and others. The farm was for ten years, from 1228 to 1237 *Fuslee*,—was held by Purshad Chowdhree

to the year 1230, when he died. Then the plaintiffs, as his heirs, held possession to 1234 *Fuslee*, and the revenue to the Government was regularly paid, of which they hold receipts. In 1235 they lease it in under-lease to Karee Rae and Kunnyah Sahee, who failing to pay the rent, the plaintiffs obtained a decree against them for the rent, on account of 1236 and 1237. In 1238, Bishenpurshaud Nurain, and Baboo Bugwunt Nurain and others took possession, without discharging the loan advanced; hence this suit.

‘ Answer of Heera Sahee, Gobind Sahee, and Gopal Sahee. The plaintiff has no right to sue them, not having received any portion of the advance.

‘ Answer of Sheeoo Nurain Rae and Soodee Rae. From the period of dispossession to the institution of suit, more than 12 years have elapsed. If the plaintiffs had been dispossessed, they would have complained at the *thannah*. They neither granted the farm, or received the advance, and are sued from the occurrence of being brothers to Sunker Rae.

‘ Answer of Sheehoo Sunker Singh, Bullee Singh, and Seebnurain Singh, heirs of Omra Singh deceased. They neither granted the farm, or received the advance. Omra Singh purchased half an *anna* portion within the share of Nursingh Rae, Bheesdea Rae and Bhikadarry Rae, and others, and obtained a decree for the same on the 16th February 1824.

‘ Answer of Bhikadarry Rae and thirteen others. They did not receive any portion of the advance. Karee Rae and others took 675 rupees, and the remaining sum of rupees 825, receivable by them, remained in deposit with the merchant.

‘ Answer of Bishenpurkash Nurain Singh and Baboo Ramnurain Singh. The plaint is unjust towards them; they are merely purchasers.

‘ The second principal sudder ameen passed a decision of dismissal, on the grounds, although the defendants deny the claim, yet one portion of them allege that Karee Rae and others had received rupees 675 of the advance. This statement is made in collusion with the plaintiff. The evidence of witnesses has not proved the farm-lease, and their evidence is not credited. The decisions filed are of no utility in this case, discernable therefrom when the advance had been given. Yet it seems the suits were instituted for the future proof of the advance. The dispossession is stated to have occurred in 1238; although this suit is not instituted beyond 12 years of that period, yet so very nearly to it as to enfeeble the suit. The reason assigned by the attorney of the plaintiffs for delaying to institute this suit, was owing to disputes between the proprietors themselves.

‘ Against this decision the plaintiffs appealed urging, the lease has the *cazee's* seal thereon, and has been duly registered; they

continued possession of the village and the payment of the Government revenue, for which receipts were obtained, are proofs of the validity of the lease, as are also the several suits against the proprietors and decrees obtained. This suit was instituted within the period, limitation of 12 years. The collusion between Bikdarry and others with them not being proved, the decision of the second principal sudder ameen is not correct.

‘Answer of the respondents are similar to their answers in the original case.

‘From the decisions filed in this case, the plaintiffs it appears inserted in all the plaints the suits were instituted under a lease of farm, on which advance had been made; the defendants therein filed no answers, and the cases were decided *ex parte*. It is not stated in any of the decisions that it was necessary to enquire into the matter of the lease, and the advance made thereon; and from the execution of the decree cases, it appears the amounts of the decrees were realized without any objections being made to the above two points. It is my opinion, that those sharers who did not sign the lease are not liable to payment of the advance, or by the purchasers of shares in the village under bills of sale, a clause to that effect not being specified therein. The signers of the lease alone are liable to the payment of the advance. Although some of the sharers throw on other sharers of having taken the advance, is no proof thereof. Of the witnesses brought forward by the plaintiffs, one only is a subscribing witness to the document; and from the other witnesses, it is ascertained from themselves they had transactions with the father of the plaintiffs; therefore their evidence is doubtful and cannot be admitted in proof. Under these circumstances, the appeal is dismissed with costs of both courts, and the decision passed by the second principal sudder ameen confirmed.’

The document on which this suit was instituted, was attested by the *cazee*, and duly registered. It appears, moreover, that suits have been instituted and decrees obtained against the under-farmers, some of the parties borrowing the money, and that these have been without demur.

The judge, moreover, appears in one part of his judgment to consider that the bond was actually executed, and in another he intimates a doubt to this effect.

Considering the judgment to be incomplete, I admit the appeal; and remand the case, in order that the judge may distinctly record his opinion as to whether the document was executed or not, and decide *de novo*; stating his reasons in the former instance for the decision he may arrive at, in regard to the liability, or otherwise, of the several defendants to the demand made upon them.

THE 14TH JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 125 OF 1846.

Special Appeal from a decision passed by Raee Radhagovind, Principal Sudder Ameen of Zillah Hooghly, September 16th, 1844; affirming a decree passed by Bhyrub Chunder Bose, Sudder Ameen of that district, February 19th, 1844.

SHEIKH MOKEEM SIRCAR, APPELLANT, (PLAINTIFF,)

versus

TUREE BIBI AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeels of Respondents—Rampran Raee, Bunsee Buddun Mittr and Taroke Chunder Raee.

THIS case was admitted to special appeal, on the 7th March 1846, under the following certificate recorded by Mr. J. F. M. Reid:—

‘ Plaintiff states that Sheikh Nueem and Rufee Bibi sold, conditionally, to Asamoolla a tank, &c.; that Asamoolla having issued the usual notices of foreclosure, got the usual order to sue for possession of the property as under a foreclosed mortgage; that Asamoolla, without having sued for possession, sold the property to plaintiff, with a condition that the money should be repaid in two years, and died; and plaintiff having issued the proper notice, got the usual order to sue to foreclose. He did institute this suit for that purpose against Sheikh Nueem, Rufee Bibi, and the heirs of Asamoolla.

‘ The sudder ameen and principal sudder ameen both dismiss the claim:—*first*, because Asamoolla could not sell that of which he had not possession; and, *second*, because the deed of sale was vitiated by the seller, Asamoolla, having described the property as in his possession. I am inclined to think that as the right to claim a foreclosure can exist, without actual possession of the thing pledged, so that right may be sold without such possession; and

I doubt the propriety of the second plea. I therefore admit the appeal to try these points.'

MR. DICK.—I am of opinion that the Mahomedan law does not apply in such cases of contract. I would therefore remand it for investigation and decision on its merits.

MR. JACKSON.—The rules in force for the application of the Mahomedan law to the decision of cases, viz. Section 15, Regulation 4, 1793, and Sections 8 and 9, Regulation 7, 1832, refer only to suits regarding succession, inheritance, marriage, and caste, as well as religious usages and institutions. This is a suit on a contract of sale; and the special rule of Mahomedan law, that the seller must be in possession of the thing sold, cannot be held to apply. The principal sudder ameen has applied the rule erroneously, and the case must be remanded for decision without reference to that rule.

MR. HAWKINS.—This is a case of transfer by a mortgagee of his rights and interests in a mortgage held by him upon real property. To such a transfer, I know of no legal impediment whatever. I accordingly concur with my colleagues in remanding the case for trial on its merits.

THE 15TH JUNE 1848.

• PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION NO. 178 OF 1848.

IN the matter of the petition of Neemye Chunder Sircar, filed in this Court on the 30th May 1848, praying for the admission of a special appeal from the decision of Moulvee Abdool Ali, principal sudder ameen of zillah Rajshahye, under date the 11th March 1848; reversing that of Hur Mohun Neogee, moonsiff of Bhowanyunge of that zillah, under date the 7th July 1847, in the case of petitioner, plaintiff, *versus* Musst Surrushsuttee, defendant.

The petitioner sued to recover from defendant the sum of Company's rupees 60-7-2 on a bond, and obtained a decree *ex parte*. The principal sudder ameen admitted the appeal of the defendant; and, without any enquiry as to the cause of her not appearing in the lower court as directed in such cases to be done in the Circular Order, dated 12th March 1841, reversed the decision of the moonsiff.

I therefore admit the special appeal applied for; and, annulling the decision of the principal sudder ameen, remand the proceedings to that officer, with instructions to take up the appeal again, and to conform to the Circular Order above mentioned.

THE 15TH JUNE 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION NO. 177 OF 1848.

IN the matter of the petition of Benichurrun Rae and others, filed in this Court on the 30th May 1848, praying for the admission of a special appeal from the decision of Mr. W. Luke, judge of East Burdwan, under date the 1st March 1848 ; affirming that of Mohummud Saem, sudder ameen of that zillah, under date the 30th August 1847, in the case of Kalichurn Rae and others, plaintiffs, *versus* Hurree Kisto Ghose and others, defendants.

Kalichurn Rae, and the widow and sons of his brother Shama Churrun Rae, instituted this suit to compel the defendants to employ them as their priest, or *porohit*, which they had recently abstained from doing.

The sudder ameen rejected the claim, in consequence of the established misconduct of Kalichurn Rae, and because when the option was given to Shama Churrun Rae, he declared he would rather give up his *juyman* than his brother.

On appeal, the judge affirms the decision of the sudder ameen ; but, as far as can be gathered from his judgment, merely on the evidence with regard to Kalichurn Rae, for he does not so much as mention Shama Churrun Rae in his decision. Considering therefore the decision of the judge to be incomplete, I remand the proceedings for further consideration, and for a record of the judge's opinion on the claim of the heirs of Shama Churrun Rae, the petitioners.

THE 15TH JUNE 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION NO. 176 OF 1848.

IN the matter of the petition of Debnurain Ghose and others, filed in this Court on the 30th May 1848, praying for the admis-

sion of a special appeal from the decision of Mr. H. F. James, judge of zillah Jessore, under date the 14th March 1848; affirming that of Mohummund Kulleem, first principal sudder ameen of that zillah, under date the 23d December 1844, in the case of Reazut Ali and others, plaintiffs, *versus* the petitioners and others, defendants.

The judge's decision in this case will be found at page 17 of the decisions for March 1848, for zillah Jessore; but as it has been drawn up with utter disregard to the provisions of Act 12, 1843, which enjoins that 'so much of all decrees as consist of the points to be decided, the decision thereon, and the reasons for the decision shall be written originally in English by the judge, I annul the said decision; and remand the proceedings to the judge, who will draw up his decision *de novo* in accordance with the law as above quoted.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 531 OF 1847.

Special Appeal from a decision passed by H. V. Hathorn, Esq., Judge of Sarun, March 26th, 1847; reversing that of Syud Imdad Ali, Principal Sudder Ameen of that district, February 25th, 1845.

BIRJRUNG SAHAEE, APPELLANT, (DEFENDANT WITH
OTHERS,)

versus

MUNRAJ SINGH, AND OTHERS, RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellant—Ameer Ali.

Wukeels of Respondents—Hamid Russool and Nilmoney Banerjee.

THIS case was admitted to special appeal, on the 17th August 1847, under the following certificate by Mr. J. A. F. Hawkins:—

" This was an action between Hindoos ; the plaintiffs claiming certain real property on the ground of pre-emption. The principal sudder ameen dismissed the claim, on the ground that though the plaintiffs appear to have known of the transfer at the time it was made, the suit was not instituted until $14\frac{1}{2}$ months after the date of such transfer.

" The judge reversed the decree of the court of first instance. In his judgment he observes as follows :—' The law enjoins merely a declaration of intention to purchase, *immediately on hearing of the sale*. Now, it does not appear that plaintiffs had any knowledge of the transaction, until the issue of the collector's proclamation, dated 20th March 1844, notifying the application for mutation of names, when they 'immediately' offered the sellers their price in the presence of certain witnesses.'

" I admit the special appeal to try, whether, under the facts stated by the judge in his judgment,* the 'immediate claim' of pre-emption has been made so as to support an action of this nature."

We have found it necessary to peruse the evidence of the witnesses in this case, in order to arrive at a distinct apprehension of the expressions,—'intention to purchase immediately on hearing of the sale,'—and, 'immediately offered the sellers their price in the presence of certain witnesses.' We find the witnesses depose that the plaintiffs, on hearing of the transfer, took the money first to the purchaser, and then to the seller. But the law requires something more than this, as a preliminary to the offer of the amount of purchase money in the presence of witnesses. It declares "that a person should assert his claim of pre-emption in the assembly (before it breaks up) where he hears of the sale; using language that is unambiguous, such as 'I have claimed pre-emption, or the like; or I am a claimer of pre-emption, or I claim it.' Such is the meaning of the term *tulb-i-mowasibut*, or immediate claim, which is so called to shew the necessity of extreme despatch".—Macnaghten's Mahomedan law, page 183.

This 'immediate claim' was omitted by the plaintiffs; and therefore, under the Mahomedan law, (the only law under which their claim can be recognized at all), their suit cannot be sustained.

We accordingly reverse the decision of the zillah judge, and confirm the order of dismissal of plaintiffs' claim passed by the principal sudder ameen; not however upon the grounds on which that functionary proceeded, in ruling that the suit could not be instituted $14\frac{1}{2}$ months after the date of the transfer, which we consider to be wrong. The costs in all three courts will be charged to the plaintiffs.

* See page 22 of Decisions for Zillah Sarun for 1847.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 315 OF 1847.

Special Appeal from a decision passed by the Judge of Zillah Sarun, April 23rd, 1845; reversing a decree passed by the Principal Sudder Ameen of that district, November 27th, 1843.

KISHEN DYAL SINGH AND OTHERS, APPELLANTS,
(PLAINTIFFS),

versus

TALEEMUND RAEI AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellants—J. G. Waller.

Wukeels of Respondents—Pursun Komar Tagore and Ameer Ali.

THIS case was admitted to special appeal, on the 26th January 1847, under the following certificate recorded by Mr. C. Tucker:—

‘The petitioner’s (appellants) ancestors borrowed the sum of Sicca rupees 700, from the ancestors of the defendants in *Bhadoon* 1226 F. S., payable at the end of 1234; and granted them a farm of their estate for eight years from 1227 to 1234 to meet the interest, with the usual condition that it was to continue in force till the principal sum was paid. In *Maugh* 1228, they borrowed a further sum of Sicca rupees 701; and gave an *ikrar* that, if both sums were not paid by the close of 1234, they would execute a regular bill of sale for the property for the aggregate sum; and that if they failed to do so, then the engagement itself was to be considered in the light of a bill of sale.’

‘The money not being paid, the mortgagees, after issuing notice to the mortgagers under Regulation 17, 1806, instituted a suit to foreclose. This case was tried by a moonsiff, who, on 10th August 1835, decreed for the mortgagees. The amount due, however, had been deposited in court 1st May 1832.

‘An appeal was preferred by the mortgagers, which was tried by a principal sudder ameen, who, on 14th March 1837, reversed the moonsiff’s decision, deciding that the amount due to the mortgagees had been deposited in court within the year of notice.

‘ A special appeal was applied for and obtained by the mortgagees ; and the judge, Mr. H. Nisbet, on 12th June 1839, reversed both the decisions of the lower courts, declaring the transaction to be one of simple mortgage, and not of the nature of *byebilwuffa*, and that therefore the provisions of Regulation 17, 1806, did not apply. He therefore dismissed the original claim of the mortgagees, and ordered the mortgagers to take back the money they had deposited in court ; adding that if the parties could not arrange the matter between them, the mortgagees might bring a suit for the money.

‘ After this decision, the mortgagers instituted the present suit, on the grounds that the final decision of the judge just mentioned having declared the transaction to be one of simple mortgage, it became subject to the provisions of Regulations 1 of 1798, and 15 of 1793, and that they were entitled to an account of receipts during the period of the mortgagees’ possession. The case was heard by Syud Imdad Ali, principal sudder ameen, who decreed possession to the plaintiffs, mortgagers, on the payment of a certain sum due to the mortgagees. Appeals were preferred by both parties. The judge, Mr. Hathorn, reversed the principal sudder ameen’s decision, rejecting the claim of the mortgagers to demand an account. He remarked that the conditions attached to the second loan altered the nature of the transaction from a simple mortgage to one of sale ; that the first decision by the moonsiff (10th August 1835) was correct, and the subsequent ones wrong.

‘ Under this decree of Mr. Hathorn, the mortgagees become the proprietors of the property ; and the moonsiff’s decree of 10th August 1835, which was cancelled by the judge’s decision of 12th June 1839, is upheld.

‘ I admit the special appeal to try whether the present judge, Mr. Hathorn, was not bound by the previous decision of Mr. H. Nisbet of 12th June 1839, as to the nature of the transaction ; and, if so, whether the case should not be returned to be disposed of under Regulation 1 of 1798, and Section 11, Regulation 15, 1793.’

Under the circumstances set forth in the above certificate, we are of opinion that the judge was bound by the decision of Mr. H. Nisbet, dated 12th June 1839, as to the nature of the document, and was not at liberty to open up that point again, nor to uphold a decision (the original one of the moonsiff of Sewan, dated 10th August 1835,) which had been reversed and set aside by his predecessor in office, Mr. H. Nisbet. We accordingly annul the judge’s decision of 23d April 1845 ; and remand the proceedings, with instructions to dispose of the appeal in this case on its merits, with reference to the petition of plaint filed by the plaintiffs, mortgagers.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 451 OF 1847.

Special Appeal from a decision passed by the Acting Judge of Zillah Shahabad, November 25th, 1845 ; affirming a decree passed by the Principal Sudder Ameen of that district, September 15th, 1844.

GUJPUT RAE, APPELLANT, (DEFENDANT, WITH OTHERS,)

versus

DEGUMBUR SUHAE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—E. Colebroke.

Respondent—Defaulting.

THIS case was admitted to special appeal, on the 13th July 1847, under the following certificate recorded by Mr. C. Tucker :—

‘ This suit should have been dismissed, with costs, under Section 22, Act 12 of 1841.

‘ An estate, paying revenue direct to Government, was sold for arrears of Government revenue on the 9th June 1843, and purchased by the petitioner (appellant) and four others. The plaintiff sued them on the grounds that the purchase was made partly on his account ; and that as they refused to recognize him as part purchaser, he sued them for the share, previously stipulated, he was to hold and to have his name recorded in the collector’s books as part proprietor. He obtained a decree from both the lower courts.

‘ The application for a special appeal was not preferred under Section 22, Act 12, 1841 ; but, in my opinion, that Section is binding on the courts whether pleaded or not. The language is, ‘ shall be dismissed with costs.’

‘ I therefore admit a special appeal, because the suit has not been disposed of according to law,—to wit Section 22, Act 12, 1841.’

Under the circumstances stated in the above certificate, which the respondent has not appeared to call in question, we annul the decisions of both the lower courts, and dismiss the original plaint with all costs against the respondent.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 452 OF 1847.

Special Appeal from a decision passed by the Acting Judge of Zillah Shahabad, November 25th, 1845; affirming a decree passed by the Principal Sudder Ameen of that district, September 15th, 1844.

GUJPUT RAE, APPELLANT, (DEFENDANT, WITH OTHERS,) *versus*

SHUNKER SUHAE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—E. Colebrooke.

Respondent—Defaulting.

THIS case was admitted to special appeal by Mr. C. Tucker on the same date, and for similar reasons as those set forth in the certificate given in the preceding case (No. 451); and the judgment passed is consequently the same.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 456 OF 1847.

Special Appeal from a decision passed by the Acting Judge of Zillah Mymensingh, August 21st, 1844; reversing a decree passed by the Principal Sudder Ameen of that district, December 22d, 1843.

RAMCHURN GOOHO, APPELLANT, (PLAINTIFF,) *versus*

SULAMUT KHAN AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellant—Ramapershad Rae.

Respondents—Defaulting.

THIS case was admitted to special appeal, on the 14th January 1847, under the following certificate recorded by Mr. C. Tucker:—

‘ The petitioner (appellant) deeming himself entitled to enhance the defendants’ *jumma*, issued notice to them under Regulation 5, 1812, claiming rupees 59-8, annual rent. The defendants took no notice of this; and the petitioner, some time after, brought the present suit to establish his right to that amount of rent, and for the arrears due at that rate from the date of notice; laying his suit at one year’s *jumma*, in addition to the amount arrears claimed.

‘ The principal sudder ameen decreed for the petitioner; but, on appeal, he was nonsuited by the judge, on the ground that the suit was instituted contrary to Construction 1272, which rules that suits instituted, with a view to fix the *jumma* of *ryuts*’ holdings, should be laid at one year’s rent. But there is no prohibition to a person including in the same suit the amount arrears due, to which he would be entitled from the date of the notice under Regulation 5, 1812, provided he establish his right to enhance the *ryuts*’ *jumma*. Conceiving the judge’s decision to be contrary to the usual practice of the courts, and also to the provisions of Section 10, Regulation 5, 1812, I admit the special appeal to try whether the case should not be remanded to that officer to be tried on its merits.’

We are of opinion that the suit was properly estimated, and in strict conformity with the Construction 1272. We therefore annul the acting judge’s decision; and remand the proceedings to the judge, with orders to restore the appeal to the file on its original number, and to dispose of it on its merits.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 530 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Shahabad, April 3rd, 1846; reversing a decree passed by the Moonsiff of Kudhattee, August 21st, 1845.

LULLIT RAE, APPELLANT, (PLAINTIFF,) „

versus

RUBHI RAE, AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Ameer Ali.

Wukeel of Respondents—Hamid Russool.

THIS case was admitted to special appeal, on the 19th August 1847, under the following certificate recorded by Mr. Charles Tucker:—

‘When this case was before the moonsiff, both parties (plaintiff and defendants), agreed to abide by the deposition of one Beethul Rae, who was accordingly summoned and examined on oath, and the moonsiff disposed of the case on his evidence.

‘On appeal, the principal sudder ameen reversed the moonsiff’s decision, remarking that the agreement of the parties to abide by the evidence of Beethul Rae, not having been committed to writing, was of no avail.

‘I admit a special appeal to try, whether the verbal agreement of the parties before the judge, and recorded in the decree, is not all that is required; and, consequently, that the decision of the principal sudder ameen is not founded on any Regulation or Act.’

We find that all parties acquiesced in the disposal of the suit, before the moonsiff, on the evidence of Beethul Rae, and that the moonsiff recorded a distinct *roobucaree* on the subject, and then summoned Beethul Rae, and disposed of the case on his evidence. Under these circumstances, we annul the decision of the principal sudder ameen, and affirm that of the moonsiff with all expenses against the respondents.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 34 OF 1847.

Special Appeal from a decision passed by Mohummud Rafik Khan, Additional Principal Sudder Ameen of Patna, March 27th, 1845; confirming a decree passed by Mirza Mohummud Sadeek, Sudder Ameen, May 3d, 1844.

PREAJ NURAIN, APPELLANT, (PLAINTIFF,)

versus

AJODHYAPURSHAD AND OTHERS, RESPONDENTS,
* (DEFENDANTS.)

Wukeels of Appellant—Hamid Russool and E. Colebrooke.

Wukeel of Respondent—Aftabooddeen.

THIS case was admitted to special appeal, on the 10th November 1846, under the following certificate recorded by Mr. Charles Tucker :—

‘ One Sanik Ram died leaving a widow, Juddoo Bunsee Koonwur, and one unmarried daughter, Parbuttee. The widow borrowed some money from the plaintiff to defray the expense attending the marriage of this daughter.

‘ On instituting a suit for the recovery of the amount against the widow and nephews of Sanik Ram, who succeeded to his estate, the lower courts refused to give a decree against the estate of Sanik Ram, but confined their award to the widow personally and any property she might possess in her own right.

‘ The marriage of unmarried daughters is one of the objects for which the Hindoo law allows a widow to alienate a portion of her deceased husband’s estate ; consequently, a debt contracted for this purpose, should be a charge on the estate of the deceased, and not on the widow personally. Special appeal admitted on these grounds.’

With reference to what is set forth in the above certificate, we amend the decisions of both the lower courts and decree against the estate of Sanik Ram, against which the appellant is at liberty to take out execution in satisfaction of this decree. Costs chargeable to the respondents.

THE 17TH JUNE 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 533 OF 1847.

Special Appeal from a decision passed by the Additional Judge of Chittagong, December 14th, 1846 ; reversing a decree passed by the Moonsiff of Deeang, February 28th, 1846.

SOONAOOLLAH KOOLAL, APPELLANT, (PLAINTIFF,) *versus*

MOHUSSUN KOOLAL AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

*Wukeel of Appellant—Gholam Ahmud Khan.
Respondents—Defaulting.*

THIS case was admitted to special appeal, on the 23d August 1847, under the following certificate recorded by Sir R. Barlow:—

‘ The plaintiff sued the defendants to be reinstated into caste, alleging they refused to admit him to their feasts, and deprived him of his privileges. The defendants pleaded that the plaintiff, by rearing pigs and selling them, had excluded himself from caste, and was no longer a Mahomedan.

‘The moonsiff gave a decree in favor of the plaintiff, being of opinion that the defendants had failed to prove their pleas. The additional judge reversed this decision. He held it to be proved that *the plaintiff had acted improperly*, and therefore his neighbours had unanimously expelled him from their society. In special appeal, the petitioner (plaintiff) denies the allegations in the answer; and urges that, though they be true, he is not subject to loss of caste. The law officer of this Court in his *fatwah* declares the act of the plaintiff does not subject him to expulsion from Mahomedan society, though it be improper.

‘A special appeal is admitted to reverse the additional judge’s decision.’

Under the exposition of the Mahomedan law, furnished at the requisition of the Court, we reverse the additional judge’s decision, and declare the petitioner (appellant) entitled to retain his position in caste, and charge costs to the defendants in all courts.

THE 17TH JUNE 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 529 OF 1847.

Special Appeal from a decision passed by the Judge of Zillah Jessore, April 2d, 1846; reversing a decree passed by the Moonsiff of Koorah, September 8th, 1845.

NOYANDEE MOLLA AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

ZUMEERODDEEN AND MOSAHIBOODDEEN,
RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellants—Shibnuraïn Chatterjee.

Wukeel of Respondents—Nilmoney Banerjee.

THIS case was admitted to special appeal, on the 17th August 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘In this case the plaintiffs, holding some lands under the defendants, sued to have the *jumma* fixed thereon agreeably to the *pergunnah* rates. The defendants shewed that the plaintiffs had already entered into engagements with them for the rent of their lands, and had executed a *kubooleeut*, on which *kubooleeut* they

had obtained a summary decree for balance of rent. That the plaintiffs had instituted a regular suit to cancel the summary decision, denying the *kubooleut*, which suit had been dismissed in original and in appeal.

‘On these grounds the moonsiff dismissed the plaintiffs’ claim; but, on appeal, the judge reversed his decision, and directed the lands of the plaintiffs to be measured and assessed at the *pergunnah* rates.

‘I admit this special appeal to try, whether the plaintiffs having already sued to set aside the *kubooleut* held by the defendants, and having failed therein, can maintain an action of this kind.’

We find that the judge in appeal reversed the moonsiff’s decision, on the ground that the *kubooleut* was not genuine; but this was a question which he could not entertain. The *kubooleut* had already been contested, and a decision of a competent court had declared it to be genuine.

Under these circumstances, we annul the decision of the judge, and affirm that of the moonsiff, with all costs against the respondents.

THE 17TH JUNE 1848.

PRESENT:

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 534 OF 1847.

Special Appeal from a decision passed by the Judge of Zillah West Burdwan, March 18th, 1846; reversing a decree passed by the Moonsiff of Sonamookhee, June 17th, 1844.

MUHA RANEE KUMUL KOOMAREE, APPELLANT, (DEFENDANT WITH OTHERS,)

versus

GHOLAM MUNDUL, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—Pursun Komar Tagore, J. G. Waller and Nilmoney Banerjee.

Wukeel of Respondent—Kishen Kishore Ghose.

THIS case was admitted to special appeal, on the 11th August 1847, under the following certificate recorded by Mr. C. Tucker:—

‘The plaintiff in this case stated that Neel Mohun Bhattacharje, proprietor of *mouzah* Mutthoorabatty and a moiety of *mouzah* Ruttoorapatty, held as a *lakhiraj* tenure, being indebted

to him, gave him assignments on the *ryuts*, directing them to pay their rents to him; that the *ryuts* gave him *kubooleuts*, and paid their rents regularly till 1248; for the rent due for the first six months of which year, he instituted a summary suit before the collector against several *ryuts* in one plaint. The *ryuts* denied having executed the *kubooleut*; and further asserted, that they were not *ryuts* of Neel Mohun's *lakhiraj* tenure, but paid rent for the lands they held to Ranees Kumul Koomaree, zemindar of *pergunnah Jungle Mehals*; and she (the said Ranees) appeared and shewed that she had already obtained summary decrees against these very *ryuts* for the rents of 1248. The plaintiff's summary suit was dismissed by the collector on 6th April 1843.

'The present suit was instituted on 29th June 1844, against the same *ryuts*, but including Neel Mohun, the *lakhirajdar*; and the prayer of the petitioner is, *first*, to annul the summary decision of the collector; and, *secondly*, to recover the rents, subsequently due to the close of the year 1250 B. S.

'The moonsiff dismissed the suit on three grounds:—*first*, the suit was not brought within one year from the date of the summary suit; *second*, that two claims were preferred in the same suit,—to annul the summary suit, and for subsequent arrears; and, *third*, that Ranees Kumul Koomaree should have been made a defendant, but was not.

'In appeal, in which the Ranees was included amongst the respondents, the judge reversed the decision of the moonsiff, and decreed in full for the appellant, overruling the first ground of dismissal by the moonsiff, by shewing that the suit had been instituted within one year of the delivery of the summary decree to the plaintiff. The second ground is not noticed in the judge's decision. He grounds his decision on the fact that, although the Ranees had obtained summary decrees for the rent of 1248 against these *ryuts*, it was on the admission of the *ryuts*, who had, on a previous occasion, acknowledged themselves to be the *ryuts* of Neel Mohun, the *lakhirajdar*. A special appeal is demanded on four grounds:—

'*First*—The multifariousness of the plaint.

'*Second*—The summary suit originally instituted was illegal under Construction No. 860; there should have been a separate suit against each *ryut*.

'*Third*—That the plaintiff is not empowered to sue summarily, he is not the owner of the land.

'*Fourth*—The plaintiff should have sued the Ranees Kumul Koomaree to establish the lands appertaining to the *lakhiraj* tenure.

'I admit a special appeal to try the first and third points.'

We find that the defendants joined in the execution of a single *kubooleut* to the respondent in this appeal, and paid the rent stipulated to the said respondent for some years. We do not consider the plaint to be multifarious. It was of one and the same

nature, and must have either been decreed in whole, or dismissed in whole.

Nor do we consider that the respondent was barred of his remedy of a summary process against the original defendants, on their executing a *kuboolleut* engaging to pay rent to him. Under these circumstances, we dismiss the appeal, and affirm the decision of the judge. The costs of this appeal to be paid by the appellant.

THE 17TH JUNE 1848.

PRESENT:

E. CURRIE, Esq.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 487 OF 1847.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Dinagapore, July 2d, 1847.

MUNGULMUNNEE DIBBEEA, MOTHER AND GUARDIAN OF
KERUJ MOHUN RAE, APPELLANT, (DEFENDANT,)

versus

CHUNDRABULLEE DIBBEEA, MOTHER OF KISHEN-
CHUNDER RAE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—Gholam Sufdur.

SUIT for real and personal property, valued at rupees 31,529, 11 annas, 6 pie.

The circumstances are these. Gokulnath had several sons and one daughter, Chundrabullee Dibbee, the plaintiff in this case. All the sons died before the father: the last Kaleechurun Rae, husband of the defendant, Mungulmunnee, in the year 1235. Gokulnath died in 1236, and his widow, Neelmunnee, succeeded to the property. She died in 1250; and, immediately before her death, her daughter-in-law, Mungulmunnee, adopted a son under an alleged deed of permission from her deceased husband, countersigned by her father-in-law. Mungulmunnee and Radhamunnee (the childless widow of another of Gokulnath's son) having obtained possession of the property, the present suit was brought by Chundrabullee for herself and her minor son, as the legal heirs of the father, Gokulnath. It was defended by Mungulmunnee, who alleges the preferable title of her adopted son.

The principal sudder ameen took a *bewustah* from the *pundit* of the division. It declares that an adopted son is the heir of his adoptive father only; and cannot inherit the property of his grandfather. On this ground, and also because he discredited the deed of permission, the principal sudder ameen decreed to plaintiff as guardian of her minor son, all the property standing in the name of the deceased Gokulnath and his widow, reserving to defendant a life interest in the *lakhiraj* lands purchased in the name of her husband, and the family dwelling: he declared the claim to the movable property not established.

The *bewustah* of the *pundit* is contrary to the received exposition of the law. In the case of Gourbullub, decided in the Supreme Court on the 24th March 1824, opinions were called for not only from the Supreme Court *pundits*, but from the *pundits* of the Sudder Dewanny Adawlut and of all the mofussil courts; and the weight of authority was in favor of the general heirship of the adopted son. There is a precedent to the same effect in the Sudder Dewanny Reports, Volume III. page 370.

But, though differing from the principal sudder ameen on the point of law, I concur with him on the question of fact. The deed of permission is dated the 17th Magh 1234, the adoption took place in Kartick 1250, a few days only before the death of Neelmunnee, and 14 years after the death of Gokulnath. No satisfactory reason is assigned for this delay, which, in itself, casts a strong suspicion on the authenticity of the deed of permission. Again, in 1235, Mugulmunnee applied to have her name registered as heir of her husband in a *talook* which had been purchased in his name; but no mention was then made of the permission to adopt, nor in some other applications for a similar purpose by Neelmunnee, after the death of Gokulnath. It was incumbent on defendant to take the earliest opportunity of making known the permission said to have been granted to her. Such an opportunity was obviously afforded by the application for registry in 1235, and her neglect to avail herself of it, joined to the delay in making the adoption and the circumstances under which it was made, is quite sufficient to deprive the alleged permission of any pretensions to credibility.

It is to be observed, that plaintiff's title has been admitted by the principal sudder ameen only as guardian of her minor son, whereas she is herself the legal heir. She has, however, made no objection on that score, but declares herself satisfied with the decree as it stands. It is, therefore, unnecessary to interfere further, than to declare that the contingent interests of any other party will not be prejudiced by the circumstance of the inheritance having been decreed to the son, and not to the mother. The appeal is dismissed with costs.

THE 19TH JUNE 1848.

PRESENT :

R. H. RATTRAY and

A. DICK, Esqrs.,

JUDGES.

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 457 OF 1847.

Regular Appeal from a decree passed by the Principal Sudder Ameen of Bhagulpore, Mohummud Majid Khan, January 15th, 1847.

BENEE MADHUB SINGH, APPELLANT, (PLAINTIFF,)

versus

NEELA BUTTEE AND PHOOLUN BUTTEE, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellant—Gholam Sufdur.

Wukeel of Respondents—None.

APPELLANT was the *surburakar*, or manager of the estate of Dwarkanath Ghose, the minor son of Omanath Ghose; the respondents are the widows of Ajeet Burmh, deceased.

On the 22d July 1833, a decree was passed in the case of ‘Omanath Ghose *versus* Ajeet Burmh,’ (in which the former had sued the latter for 498 *biggahs*, 14 *biswahs* of land in *mouzah* Gucheea) dismissing the claim, on the ground of Omanath’s right not being established to more than 375 *biggahs*, which 375 *biggahs* were already in his possession.

The present action was brought (on the 13th September 1844,) to recover 180 *biggahs*, 6 *biswahs* of land, with mesne profits, asserted to have been taken and appropriated by respondents’ husband, and withheld by respondents from the 375 *biggahs*, determined in 1833 to have constituted the estate of Gucheea; and, as the best mode of arriving at the truth, an *ameen* was deputed to measure the lands and report any, if any, deficiency. The result was a return of 322 *biggahs*, leaving 53 to be recovered to complete the 375 adjudged as above.

A protest had before been made by appellant against the *luggee*, or measuring rod used by the *ameen*, but without success. The *luggee* used was 4 cubits, (*hâths*) in length, and the return of 53 *biggahs* only being wanting to restore the estate to its original extent, was consequent upon this standard of measurement. A *luggee* of 5½ cubits, the established one of the *pergunnah* would, it was asserted, have given the quantity of land claimed; and this it was maintained,

upon the evidence adduced, was the one which should have been adopted, and which the court was bound to recognize.

The principal sudder ameen deeming the 4 cubit *luggee* to be that which the occasion demanded, with reference to former proceedings of the zillah court connected with the estate, adjudged 53 *biggahs*, with mesne profits upon that quantity, to appellant, who now appeals for the remainder of what he brought the action to recover.

We find, that though the *luggee* of the *pergunnah*, in which these lands are situated, is proved by a variety of evidence to be one of 5½ cubits in length, yet, that so far back as the *Fuslee* year 1001, and again in 1184 *Fuslee*, the *luggee* used by the then local authorities in determining points connected with mouzah Gucheea, was of the 4 cubit measure; and, further, that the 375 *biggahs*, declared by the decree of 1833 to constitute this estate, were so declared by the same exception to the acknowledged standard of the locality. With reference to these facts, we do not interfere with the decree appealed against, which we affirm with costs chargeable to appellant.

THE 19TH JUNE 1848.

PRESENT :

R. H. RATTRAY and

A. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 458 OF 1847.

Regular Appeal from a decree passed by the Principal Sudder Ameen of Bhagulpore, Mohummud Majid Khan, January 15th, 1847.

MUSST. PHOOLUN BUTTEE, APPELLANT, (DEFENDANT),

versus

BENEE MADHUB SINGH, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—J. G. Waller and Hamid Russool.

Wukeel of Respondent—Gholam Sufdur.

THIS was an appeal against the decree, the particulars of which are set forth under No. 457 (preceding) disposed of this day.

On the occasion of the measurement of the estate (of Gucheea) appellant had petitioned the court to have certain additional land included by the measuring ameen. A separate return was made in compliance with this application, and the quantity of land stated to exceed 375 *biggahs*, the original extent of the estate. Upon

this return, appellant pleads her non-liability to satisfy the decree which represents the estate to have been deprived, by her husband, of 53 *biggahs*.

The objection to the plea of appellant, is, that the additional land included in the second measurement of the estate, does not belong to it; and, with reference to this, we affirm the decree of the principal sudder ameen, which rejects it. Costs to be charged to appellant.

THE 19TH JUNE 1848.

PRESENT:

R. H. RATTRAY and
A. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 267 OF 1843.

*Regular Appeal from a decree passed by the Second Principal Sud-
der Ameen of Tirhoot, Syud Ashruf Hosein, August 29th, 1843.*

DURBAREE LAL SAHOO AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

BABOO RAM NURAIN SINGH AND ANOTHER, RESPON-
DENTS, (DEFENDANTS.)

Wukeels of Appellants—J. G. Waller and E. Colebrooke.

*Wukeels of Respondents—Pursun Komar Tagore and Ram Nurain
Singh.*

THE Court's former proceedings in this case, will be found recorded in the printed decisions of the 3d May 1845.

The suit was instituted by appellants, on the 30th September 1843, to recover the sum of Company's rupees 90,565-9-10 from respondents under a bond; and, on the 29th August 1843, the principal sudder ameen of Tirhoot balanced the accounts of the parties, and found due to appellants Company's rupees 27,871-10 which he decreed in their favor, against Ram Nurain accordingly. Both parties appealed from the decision; each urging their conceived rights by the arguments before advanced, and appellants also objecting to the mode adopted by the principal sudder ameen in the adjustment of the accounts, by the result of which he was guided in his judgment. He had allowed interest on the rent payments, as well as on the bond debt; and this was protested against as contrary to the terms of the agreement.

The judgment of the principal sudder ameen was deemed good and equitable; and the decree passed by him was affirmed.

Appellants have now applied for a review of the Court's decision of the 3rd May 1845, on the ground of the accounts having been made out by the principal sudder ameen in contravention of the terms of the *burnandmeh* filed in the suit (by which the mode of account involving an allowance of interest on the collections of the estate pledged to appellants, was provided against.) This was made to appear from the schedule, or detailed statement of particulars, attached to the *burnandmeh*, which schedule does not seem to have met with the consideration now claimed for it, while it certainly must be admitted to militate against the mode of calculation adopted and recognised as correct. As a general rule, it being the mode in common use, and of its being founded on just and sound principles (the allowance of interest on the payments of *both* parties to an account of this description, that is,) there is no dispute; but where there is a specific stipulation, not involving any illegality, it must, of course, be abided by; and as in the present instance there are grounds for believing such a stipulation to have been disregarded, I admit the review prayed for, to correct, if necessary, the former judgment.

Under the above admission of a review of the case by Mr. Rattray, the proceedings were this day submitted to a full bench.

MESSRS. RATTRAY AND JACKSON.—We observe, that the point referred to us, is, simply the manner in which the accounts are to be settled between the parties, viz. whether the residue of sums received from the usufruct of the land, after payment of interest, shall be carried to the liquidation of the principal and the account closed to the end of each year; or, the account run on from the date of the loan to the date of settlement, interest being allowed on the whole sum lent to one party, and to the other on the sums realized from the usufruct from the date of realization. We are of opinion that the first mentioned rule must be adopted in this case, it being a part of the conditions expressly stipulated in the *burnandmeh*, or mortgage bond, and not being opposed to any thing contained in the law in connexion with it. We accordingly modify the decision before passed, so far as to adopt this method of calculation in the settlement of the account upon which the issue of the case depends.

MR. DICK.—As the review has been admitted on one ground, and referred to a full Court by the presiding judge for decision on that ground only, I confine my judgment to that ground solely. There is an express condition in the deed, that interest shall be satisfied annually from the usufruct, and any excess be applied to the liquidation of the principal; and in two cases at least in the first volume of the Sudder Reports, the judges declared, without

hesitation, that under Section 10, Regulation 15 of 1793, such was the mode to be adopted in adjusting accounts between a mortgager and mortgagee in possession. I therefore concur with my colleagues in adjudging the accounts between the present parties to be so adjusted.

THE 19TH JUNE 1848.

PRESENT :

R. H. RATTRAY and

A. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 418 OF 1847.

Regular Appeal from a decree passed by the Principal Sudder Ameen of Patna, Mr. E. DuCosta, May 19th, 1847.

HURCHURN SOOKUL, APPELLANT, (DEFENDANT,)

versus

GUNGA PURSHAD AND GOVIND PURSHAD, RESPONDENTS, (PLAINTIFFS.)

Wukeels of Appellant—Pursun Komar Tagore and Hamid Russool.

Wukeel of Respondents—J. G. Waller.

THIS suit was instituted by respondents, on the 29th August 1843, to obtain exemption from responsibility in regard to a bond, granted by Benee Singh and Byjnath Singh, to Hurchurn Sookul; and to save their estate from sale in satisfaction of a decree of court, passed against them as parties to the said bond,—they having been, at the time of execution of the said bond and at the time of the passing of the said decree, minors.

On the 20th November 1844, the principal sudder ameen dismissed the suit with all costs; but the general explanation of the grounds upon which the principal sudder ameen arrived at the judgment he recorded, being considered unsatisfactory, the proceedings were returned for revisal by this Court, on the 4th March 1846, as shewn in the printed decision of that date.

On the 30th June 1846, the principal sudder ameen passed a new decision, exempting Govind Purshad from liability, but disallowing the claim of Gunga Purshad: this, on the ground of the former having been still a minor, while the latter had obtained his majority, in 1836, when the decree in the original suit for the bond debt was passed against them.

On the 10th November 1846, this decision having been petitioned against by Gunga Purshad, who was eventually admitted to appeal in *forma pauperis*, Mr. Reid (then a judge of the Court) did not deem the enquiry of the principal sudder ameen (of the 30th of June) sufficient. The point at issue, he observed, was 'whether the plaintiffs were, or were not, of age when the bond executed on their behalf was written, and this point has not been sufficiently enquired into. I therefore again annul the decision of the principal sudder ameen; and direct that the case be replaced on the file, and that the principal sudder ameen receive and examine such evidence, oral and documentary, as the plaintiffs may adduce to prove their minority at the time of the execution of the bond, as well as what the defendants may bring forward to rebut that plea.'

Then followed (on the 19th May 1847) the decree of the principal sudder ameen now appealed against. He observes, that the point referred to by Mr. Reid was clearly established by the bond itself. Benee Singh and Byjnath Singh having signed it for themselves, and as guardians of Gunga Purshad and Govind Purshad, who were then evidently minors. Besides, he proceeds, this fact is also established by the proof adduced by both parties. I therefore pass a decree in favor of the plaintiffs, exonerating them from all liability of the judgment debt. Costs payable by the defendant.

Messrs. RATTRAY AND JACKSON.—We find that this suit was brought to obtain a decision of the Court, declaring the plaintiffs not liable under a decree passed against them on the 25th February 1836, on the ground of their having been minors at the time the bond was written, which formed the basis of that decree, and further of their having still been in their minority when the decree was passed. It appears, that the bond was executed by their uncle, both on his own part as a sharer in their joint estate, and on the part of these two nephews as his wards. The suit was brought against the three, but was defended only by the uncle. The decree was given against them all. At the time of institution of the suit, the plaintiffs were minors, but they were represented by their guardian throughout; and if one or both of them attained majority while the case was pending, the decision is not thereby rendered void. They might have petitioned on reaching majority, to be admitted as defendants; but their neglect to do so does not vitiate the decree. The bond was entered into for the benefit of all parties; and the guardian was fully competent, under the particular circumstances, to execute it, having been, as it evidently was, for the benefit of the whole estate, and of all the sharers in it. We consider the decree, which it is sought to invalidate as regards the plaintiffs, to be good and valid against them; and, reversing the decision of the principal sudder ameen, we dismiss their claim with costs.

MR. DICK.—I am of opinion, the suit being to amend a former decree of a competent court, which had become final, that it should have been dismissed forthwith. The plaintiffs' only remedy was a petition for review.

THE 19TH JUNE 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 162 OF 1848.

IN the matter of the petition of Ramjoy Sirdar Bhoomij, filed in this Court on the 22d May 1848, praying for the admission of a special appeal from the decision of Chundur Seekur Chowdhree, principal sudder ameen of zillah West Burdwan, under date the 24th February 1848; reversing that of Gopee Kishen Banerjee, moonsiff of Kotulpoor, under date the 3d May 1847, in the case of petitioner and others, plaintiffs, *versus* Chowdhree Bhoomij and others, defendants.

The plaintiffs in this case allege that, from time immemorial, the *thakoor* Bulram, established in Rogonath *bazar*, was the joint property of all the Bhoomij's; and that by consent of the whole body, the defendant, Chowdhree Bhoomij, was appointed *poojaree*, and that the offerings made to the idol, on the last day of the month of *Poose* in each year, were invariably divided amongst the whole of the Bhoomij fraternity; but that the defendant had withheld their share since *Poose* 1252 B. S., to recover the value of which the present suit was brought.

The defendant, Chowdhree Bhoomij, denied the claim of the plaintiffs to participate in the offerings, as also to any proprietary share in the *thakoor*, or that he was appointed *poojaree* by the body of Bhoomijs.

The moonsiff, whilst admitting that the plaintiffs had entirely failed to establish any proprietary right in the *thakoor*, or the appointment of the defendant Chowdhree Bhoomij as *poojaree* on the part of the other persons of that caste, yet declared it to be fully and satisfactorily proved that the plaintiffs had always, heretofore, participated in the offerings made on the last day in the month of *Poose* in each year, and accordingly decreed for plaintiffs the amount claimed.

The principal sudder ameen in appeal reversed the moonsiff's decision, on the ground that it was inconsistent in the moonsiff to allow the plaintiffs to participate in the offerings to a *thakoor*, of which he admitted they were not proprietors.

But the moonsiff's decision is founded on evidence establishing the fact of participation, and of which the principal sudder ameen takes no notice whatever.

I consider the principal sudder ameen's decision, therefore, to have been given on insufficient investigation as to the evidence on record ; and I accordingly remand the proceedings to him, with instructions to restore the case to the file of his court, and to dispose of it *de novo* after due consideration of the evidence adduced in support of the plaintiffs' claim.

THE 19TH JUNE 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 123 OF 1848.

IN the matter of the petition of Raneé Chooramunnee and others, filed in this Court on the 22d April 1848, praying for the admission of a special appeal from the decision of Captain John Hannington, deputy commissioner of Hazareebagh, under date the 14th January 1848 ; annulling that of Sham Chundur Raee, principal sudder ameen at Purroleeah of the Manbhoom division, under date the 9th August 1845, in the case of the petitioners, plaintiffs, *versus* Sonatun Manjee, defendant.

The petitioners sued the defendant for arrears of rent from 1241 to 1251 B. S., (11 years) on a *kuboolleut*, dated in *Maugh* 1236 B. S., stipulating for the payment annually of *Sicca* rupees 57. The defendant denied having executed the *kuboolleut*, and, further, pleaded that the lands for which it purports to have been given were his *lakharaj* property. The attesting witnesses to the *kuboolleut*, (two in number) were dead ; but the plaintiff produced the writer of it, and four persons who were present when it was executed, and from their evidence the principal sudder ameen was satisfied the document was genuine, and decreed the principal sum, refusing to allow interest on account of the delay in bringing the suit.

The deputy commissioner, in appeal, reversed the principal sudder ameen's decision, remarking that the two attesting witnesses to the *kuboolleut* being dead, the document was not deserving of credit.

I consider the deputy commissioner's investigation to be obviously incomplete. When the attesting witnesses to a document are dead, the holder of the document is not debarred from proving it by other means, as she did in this case to the satisfaction of the principal sudder ameen ; of which, however, the deputy commissioner takes no notice whatever.

The only point in issue in this case, is, the genuineness, or otherwise, of the *kuboolleut*. I therefore admit a special appeal ; and

remand the proceedings to the deputy commissioner, who will restore the case to his file, and dispose of it *de novo* after due consideration of the evidence adduced in support of the *kubooleet*.

• THE 20TH JUNE 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 227 OF 1846.

Regular Appeal from a decision passed by Ræe Hurchunder Ghose, Principal Sudder Ameen of 24-Pergunnahs, March 13th, 1846.

RAM KUMMUL MUNDUL, APPELLANT, (PLAINTIFF,) :

versus

FUKEERCHUND HOLDAR, SUMBOO CHUNDER HOLDAR, MR. W. N. HEDGER, AND BIRMOMYE DASSEE, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Gholam Sufdur.

Wukeels of Respondents—Pursun Komur Tagore, J. G. Waller, and Kishen Kishore Ghose.

SUIT for rupees 5,379-0-16, interest claimed on a sum of money for which plaintiff had obtained a decree against Birmomye Dassee, but payment of which was withheld in consequence of claims advanced by the other defendants.

The plaintiff had, on 4th July 1832, instituted a suit against Birmomye Dassee, widow of Muthoor Mohun Mundul, for recovery of a sum of rupees 9,386-10-13-1, on a mortgage bond executed by her deceased husband on the 30th Bhadoon 1237 B. S., or 2d September 1830. He obtained a decree on the 8th August 1836, which awarded to him the sum sued for, besides costs and prospective interest, to be realized from the mortgaged property; but if that had been sold, then from the proceeds of sale.

The entire estate, on the security of a portion of which the money was lent by the plaintiff, was sold for arrears of revenue on the 1st February 1838 for a sum of rupees 40,500, which left a considerable surplus after payment of the arrears, of which one-fourth belonged to the defendant, Birmomye. For the attachment of her share, the plaintiff applied to the court on the 3d February 1838. The defendant, Mr. Hedger, had obtained a decree against the same party in the Supreme Court, on a bond dated 18th September 1830. On the 10th February, he applied directly to the collector to attach the money in his hands belonging to the defendant, Birmomye Dassee; and, in order to establish his right of execution against this deposit, he instituted a suit in the zillah court against Birmomye Dassee, but was opposed by Ram-

kummul Mundul, the plaintiff in this action. On the 19th August 1839, the zillah judge gave a decree against Birmomye Dassee, but reserved to the plaintiff, Ramkummul, a prior right of execution against the money in deposit with the collector. This decree was confirmed by the Sudder Court on the 14th July 1841.

The defendants, Fukeerchund Holdar and Sumboochunder Holdar, instituted a suit against Lukhenurain Mundul, one of the proprietors of the estate, for the recovery of 42,905 rupees, on a deed dated 13th Kartick 1242, purporting that the money advanced by them was on the security of the general estate. The suit was instituted on the 10th February 1838; and the Holdars immediately applied to the court for attachment of the surplus in the hands of the collector, requesting that, in the meantime, (that is until the decision of the suit) it might be invested in Government securities. Their suit was dismissed in the zillah on the 19th August 1839, and finally by the Sudder Court on the 18th July 1843, not on the ground of the document on which they had sued never having been executed, but because execution could not be had against the surplus proceeds of sale, in consequence of the special provisions of the deed.

While these cases were pending, various other parties applied for attachment of the money in the hands of the collector. Some of these applications are not clear as to the share, or shares, the attachment of which was prayed for; while others clearly specify the shares of other partners, distinct from that of Birmomye Dassee.

The plaintiff at length, in the month of December 1843, obtained the share of Birmomye Dassee in part satisfaction of his decree of the 8th August 1836; and, on 21st March 1845, instituted this suit against the Holdars and Mr. Hedger to recover from them interest on that sum for the periods during which they had respectively kept him out of his money. On the 13th March 1846, Rae Hurchundur Ghose, principal sudder ameen of the 24-Pergunnahs, dismissed the plaint, on the ground that as the attachments made on the applications of the defendants were regular and legal, and no fraud was apparent, they could not be made responsible for the interest accruing during the period their claims were under investigation; and, further, that as the attachments were made on the applications of various parties, the plaintiff was not justified in selecting two of them, and charging them with the responsibility of his present claim.

From the above decision the present appeal has been preferred.

The claim preferred by the plaintiff, is in fact that of a creditor of an insolvent estate, against his co-creditors, for interest accruing during the period in which their claims were under judicial investigation. The plaintiff relies a good deal upon Construction

1010; but that Construction refers to groundless and vexatious claims to property attached in satisfaction of decrees, and declares the claimants liable for the payment of interest for the period of the delay caused by the exhibition of such claims in court. In the present case, there is no appearance of fraud. The defendants submitted their claims to the determination of the courts (neither of them is shewn to have been a groundless, or vexatious, or fraudulent claim); and, pending the investigation, they applied to the courts for the attachment of the surplus proceeds,—the Holdars accompanying their application with a request that, until decision, the money might be invested in Government securities. The plaintiff's case therefore derives no support from the Construction cited, neither has it any support from precedent. Similar cases of adjustment of claims are of daily occurrence in our courts; but not a single case has been cited, or produced, to shew the recognition by the courts of such a claim as that now advanced by the plaintiff against his co-creditors.

The plaintiff, moreover, does not appear to have taken all the necessary precautions to protect himself from eventual loss. When the zillah court passed by (as it did) without noticing it, (the application of the Holdars to have the money invested in Government securities) the plaintiff might have urged the point upon the court by another application of the same kind from himself. He however failed to do so.

There is much also in the objection taken by the principal sudder ameen, that the plaintiff should have sued all the parties who procured the attachments, the estate being a joint one. But into this point, and into another which has been raised of the inability of the collector to pay away the surplus proceeds of sale until reference had been made to the several sharers, and their replies had been received, I do not consider it necessary to enter into any length. Under the circumstances of the case, as above set forth, I concur with the principal sudder ameen in the view he has taken of it; and, dismissing the appeal, affirm his judgment with costs of both courts against the plaintiff.

THE 20TH JUNE 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 148 OF 1848.

IN the matter of the petition of Soobna Surma, filed in this Court on the 15th May 1848, (as per certificate) praying for the admission of a special appeal from the decision of the principal sudder ameen of Kamroop, under date the 21st January 1848; affirming that of the moonsiff of Kamroop under date 11th August

1846, in the case of the petitioner, plaintiff, *versus* Jeodutt Surma, defendant.

It is hereby certified that the said application is granted on the following grounds.

This was an action for money, instituted by the plaintiff against the defendant. The moonsiff gave a partial decree for the plaintiff. Both parties appealed. The one appeal was decided by the principal assistant to the commissioner, the other (the present case) was referred to the principal sudder ameen. This is contrary to practice, both appeals should have been tried by the same authority. I accordingly admit the special appeal; and, setting aside the decree of the principal sudder ameen, direct that this appeal be referred to the same authority that decided the appeal of the opposite party.

THE 21ST JUNE 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 267 OF 1846.

Regular Appeal from a decision passed by Opindur Chundur Bhutacharje, Principal Sudder Ameen of Rungpore, September 8th, 1846.

KAUNT ISREE DASSEE, APPELLANT, (DEFENDANT,)

versus

DYAMUNNEE DASSEE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeel of Respondent—Gholam Sufdur.

SUIT laid at rupees 7,596-11-7-1-10, for possession of an estate under the Hindoo law of inheritance, instituted on the 10th April 1845.

The plaintiff states she is the mother and guardian of her minor son, Okai Komar Das, on whose behalf she has instituted this action for possession of a moiety of *mouzah* Matookpore and other property, real and personal, the estate of Ramnurain Das, deceased, under the following circumstances as set forth in her petition of plaint. Gungapurshad Das, the husband of plaintiff, and Hurnurain Das, his brother, lived together as an united Hindoo family, had property, and carried on trade in common. Gungapurshad died in 1235 B. S., leaving the plaintiff, his widow, and a minor son, Okai Komar Das. The family continued associated as before. Hurnurain had a son, by name Ramnurain Das, by his first wife Kidamunnee Dassea. On her death, he, in *Aghun* 1236, married the defendant, Kaunt Isree Dassea. In 1237 he fell sick, and died in 1238. The family continued still to live peaceably together. In *Bysakh* 1240, Ramnurain Das died unmarried, and consequently plaintiff's son, Okai Komar Das,

became heir to the property. Kaunt Isree Dassee, however, applied summarily to the civil courts to get possession of his portion of the estate. She failed in the zillah court; but succeeded in the Sudder Dewanny Adawlut, on the ground that as she had held possession as the step-mother and guardian of Ramnurain Das during his lifetime, she was not to be disturbed by any summary process. Disputes occurring, the entire estate was brought under attachment under the provisions of Section 26, Regulation 5, 1812. Kaunt Isree Dassee brought a suit against the plaintiff and her son for some of the personal property, which, on a *bewustah* from the *pundit* of the Moorshedabad division, was dismissed on 28th February 1844. The plaintiff also instituted a suit in 1842, for the estate of Ramnurain Das, which was struck off on default under the provisions of Act 29, 1841, on 28th February 1844, the same day on which the suit of Kaunt Isree Dassee was dismissed. The present is a revival of the suit so struck off.

The answer of defendant, which was filed on 24th July 1845, or 10th *Sawun* 1252, is to the effect, that defendant's husband, Hurnurain Das, being sick made, on the 25th *Phagoon* 1237, a verbal disposition of his property, directing that his wife, the defendant, was to remain in management and possession of it until his son Ramnurain Das should attain his majority; that in the event of his (Ramnurain's) death, she was to adopt a son; that on the same day, Hurnurain gave information of his intentions to the collector, by a petition; and that he died in *Bysakh* 1238. The defendant giving the same account generally of the disputes which followed the death of Ramnurain Das, and the attachment of the property under Section 26, Regulation 5, 1812, proceeds to state that she has intentions of adopting a son, and will do so; and further pleads that the suit is barred by the law of limitations, upwards of 12 years having elapsed from the date of the death of Ramnurain Das, and that the amount of the property sued for has been undervalued.

On the 1st June 1846, or ten months after her answer had been filed, the defendant filed a supplementary answer, stating that her *mokhtar* had made a mistake in stating in her answer that she intended to adopt a son. She had already done so, having in *Aghun* 1251, or December 1844, seven months before her answer was on record, adopted the youngest son of one Rajkishore Nath, a child of between 2 and 3 years of age.

The principal sudder ameengave judgment for the plaintiff in behalf of her minor son, Okai Komar Das, as heir, under the Hindoo law of inheritance, to the deceased Ramnurain Das. He rejected the evidence to the permission to adopt; and has recorded reasons for discrediting the alleged petition to the collector of the 25th *Phagoon* 1237, said to have been presented by Hurnurain Das, which, as stated in a proceeding from that officer, appears never to have been recorded in his office.

In appeal, the defendant has abandoned the plea of undervaluation, which is consequently disposed of; also of the lapse of time, the fact being that the suit was instituted within 12 years from the death of Ramnurain Das. Into these points, therefore, it is unnecessary to make further enquiry, or to record any opinion as to whether the plaintiff was not at liberty, under the circumstances of the case as alleged in her reply to the answer in the lower court, to calculate her time from a date long subsequent to the death of the party whose estate she now claims in behalf of her son.

I entirely concur with the principal sudder ameen as to the insufficiency of the evidence in support of the permission to adopt, pleaded by the appellant.

But another point has been urged in the appeal. It is whether one Juggomohun Das has not a preferential claim to the plaintiff to the estate of Ramnurain Das, deceased. Not a word was said of this in the defence of the suit in the lower court, nor was any proof of the fact tendered, though the defendant was perfectly aware of his (Juggomohun's) existence and alleged relationship to the deceased; and as Ramnurain Das died 14 years ago, and Juggomohun Das has never appeared as a claimant to his estate, it is unnecessary to consider this plea any further than simply to reject it.

I affirm the decree of the principal sudder ameen, with all costs against the appellant.

THE 21ST JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 230 OF 1840.

Review of judgment passed in the above case by Mr. E. M. Gordon, on the 20th June 1844, in favor of Respondents.

DEONURAIN RAE, DECEASED, IN HIS PLACE SREENATH MITR, SON OF MUSST. SOODA MYE DASSEE, DAUGHTER OF DEONURAIN RAE, APPELLANT, (PLAINTIFF,)

versus

MUSST. KEWUL MUNNEE (WIDOW), DAUGHTER OF DEONURAIN RAE, DECEASED, IN HER PLACE KISHEN GOBIND, RAJKISHEN, AND SREEKISHEN, HER SONS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Pursun Komar Tagore.

Respondents absent in Appeal.

CLAIM 19,489 rupees on a bond.

This case was first decided on the 20th June 1844, by Mr. Gordon in this Court. His decision is as follows:—

‘Daybnurain Raee sued Heera Munnee in the Calcutta court of appeal, on the 28th September 1831, to recover the sum of rupees 19,489, 6 *annas* due on a bond. Whilst the suit was pending, the plaintiff died; and his four daughters, Sooda Maye, Kewul Munnee, Unund Maye and Sheebsoondree, claimed to be put in his place as his heirs. This was done. Subsequently, Sooda Maye died; and her son, the present appellant, came in her place, and compromised the case with the defendant. Kewul Munnee appealed, summarily, from the decision founded on the compromise; and, on the 14th August 1839, Mr. Reid ordered that Kewul Munnee’s claim as a plaintiff should be investigated, and the case re-admitted on the file for that purpose. The case then stood thus. As the defendant had virtually admitted the reality of the loan, by entering into compromise, the only question to try was, who was entitled to the decree? This point was still further narrowed, by the circumstance that the rights of Sheebsoondree and Unund Maye had lapsed, by the death of the latter, and by the fact that the former was a widow, without children. Kewul Munnee claimed an exclusive right to obtain a decree, the Hindoo law giving her a preference to the son of a sister, who had died before her. The appellant claimed to be heir, inasmuch as Thakoorain Dassee, the widow of Daybnurain Raee, had adopted a son, who, with the appellant and his mother, had been in possession of the property; that after the adopted son’s death, he (the appellant) was heir; that the property of the family was indivisible, the right of inheritance being in the eldest; and that he had obtained summary possession of *mouzah* Ahmudabad, the property of his grandfather Daybnurain, by a decree under the provisions of Regulation 49 of 1793.

‘The acting judge, on the 12th May 1840, rejected the appellant’s claim, because it was not true that Thakoorain Dassee had adopted a son; because the rule of indivisibility and succession in the eldest heir, did not extend to females; and because the question of real right of ownership could not be decided by a mere summary award of possession. He decreed accordingly for the respondent, with interest on the principal from the date of suit to that of the decree; together with costs and interest on the aggregate sum of principal and interest from the date of decree, up to that of payment.

‘The Court seeing no reason, upon an examination of the proceedings, to dissent from the above judgment, upheld it accordingly, dismissing the appeal with costs.’

Subsequently, on the 6th February 1847, Mr. Gordon entertaining doubts of the correctness of his decision, admitted a review of judgment at the instance of Sreenath Mitr. The grounds of admission are recorded in these terms:—

‘Inasmuch as one of the grounds upon which the zillah court decided in favor of the respondent in the former case was, that there was not an adopted son of Daybnurain’s; and as from documents now filed by the petitioner, there are strong reasons to suppose that Daybnurain did adopt a son many years before his death, and that that son survived him and his wife, and that the proof of this fact materially concerns the propriety of the judge’s decision, which was confirmed by me, I consider it to be proper to comply with the prayer of the petition, and to re-admit the case on the file of this Court.’

The case then came before Mr. Jackson, who directed enquiry to be made into the fact of the adoption of a son by Deonurain Rae; and further, if the adoption was proved, who were living among the grand children of Deonurain Rae at the time of the death of his adopted son, and consequently were entitled to succeed that adopted son as heirs.

To this a return has now been received, shewing that Deonurain Rae did adopt Ramnurain Rae as his son, and that Ramnurain survived his adoptive father and mother; and that the grand children of Deonurain, surviving Ramnurain, were Sreenath Mitr, Gunga Nurain, (since dead) Mohindur Nurain (since dead), sons of Musst. Sooda Mye, daughter of Deonurain; Kishen Gobind, son of Kewul Munnee (his three brothers were born after the death of Ramnurain), daughter of Deonurain; Pearee Mohun (since dead), son of Anund Mye, also dead.

The 4th daughter of Deonurain, Sheebsoondree, died without issue.

Both in the lower court, and by Mr. Gordon in his final judgment, it was declared that the arrangement (*ruffanameh*) between the defendant, Heera Munnee, and Sreenath, must be considered an admission of the justness of the claim under the bond. The judge, on this ground, gave an award in full to the plaintiff, throwing out the *ruffanameh*. From this decision no appeal has been made by the defendant; and it appears to be perfectly correct as regards her.

But the plaintiff, Deonurain, having died, it is necessary to determine who shall benefit by this decree. The judgment of the lower court, confirmed by Mr. Gordon, awarding the whole to his daughter, Kewul Munnee, is evidently erroneous in this respect. It is established that Deonurain adopted a son, Ramnurain, who succeeded exclusively to his father’s property, and to this decree among the rest. On Ramnurain’s death, the succession devolved on the children of the daughters of Deonurain then living. These were:—

Sreenath Mitr,.....	1-5th share.
Gunganurain (since dead) his heir,.....	1-5th ditto.
Mohindurnurain (since dead) his heir,.....	1-5th ditto.
Kishen Gobind,.....	1-5th ditto.
Pearce Mohun (since dead) his heir,.....	1-5th ditto.

There is now no one in court but Sreenath; Kishen Gobind having neglected to appoint a *wukeel*.

Ordered therefore, that a decree issue against defendant for the sum claimed in full, declaring the above mentioned parties, or their heirs, entitled to benefit by it to the extent noted against their names respectively. The costs in appeal to be borne by the appellant and respondents, who have appeared; each paying his own costs. The costs of the zillah court to be paid by the defendant, Heera Munnee.

THE 21ST JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

CASE No. 245 OF 1844.

Regular Appeal from a decision passed by Mr. J. Reily, Principal Sudder Ameen of Dacca, June 24th, 1844.

WILLIAM MACPHERSON, RECEIVER SUPREME COURT,
APPELLANT, (PLAINTIFF,)

versus

KHAJA GABRIEL AVIETICK TERSTEPHANOOS,
TAKOI SHRAAB AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Pursun Komar Tagore.

Wukeels of Respondents—Nilmoney Banerjee and G. S. Judge.

APPEAL laid at Company's rupees 6,159, 15 annas, 9 pie on account of interest, on the principal decreed by the lower court, disallowed.

MESSRS. DICK AND JACKSON.—The claim in the suit was for Company's rupees 13,648, 9 annas, amount of principal and interest, for sums paid into collectorate on account of arrears of revenue due by defendants, who were joint proprietors with plaintiff. The defence denied the claim altogether; and declared that, so far from plaintiff having any claim against them, they had paid up arrears for plaintiff, and were about to sue when they were anticipated

by this suit. On the part of Takoi Shraab, it was further urged that she had purchased the estate after the arrears were due, and consequently was not liable.

The principal sudder ameen, after examination of accounts of payments into the collectorate by the parties of revenue, decreed the principal of the demand as justly due, but disallowed interest for the following reasons as recorded by him :—

‘We find, that it is nearly 12 years since the payments were made; and that, in all this time, he neither preferred any claim for the principal, nor did he give defendant any intimation that he should be subject to interest for the amount. With reference therefore to Act 32, 1839, and plaintiff’s extreme neglect in delaying to claim the principal, he does not appear entitled to interest. It would not be given in a case of *wasilat* till an adjustment of accounts, and then only from the day on which the final order on the subject was passed. The collector’s *kyfeet* shews that the sum remitted was only kept *moukoof*, or in temporary abeyance; that not till the 7th November 1842, was the sum debited to profit and loss, and carried to the credit of the revenue. Plaintiff’s claim is therefore thus decreed :—that plaintiff get *Sicca* rupees 6,397-12-5, and interest on this sum from the 7th November 1842 to the date of plaint, viz. 28th August 1843, that is rupees 622-11-10-2-2; making in all *Sicca* rupees 7,028-7-15-2-2, or Company’s rupees 7,428-9-3 *pie*, with proportionate costs and interest to date of payment, recoverable from Gabriel Avietick Ter Stephanoos and the property for which the rents were paid; that this decree shall not affect the claims of Messrs. Gasper and Arathoon.’

In appeal, it has been urged on the part of appellant, that the principal sudder ameen has mistaken the meaning of Act 32, 1839, as is evident by reference to Clause 4, Section 11, Regulation 13, 1808, Act 1 of 1845, and other Regulations to the same purport, which expressly declare that interest shall be demandable for sums paid on account of revenue by one sharer for other sharers of a joint estate. The respondent, Gabriel, prays to be heard with respect to the whole case under Construction 868, although his appeal in this very case had been dismissed on default. The respondent, Takoi Shraab, claims to be heard against that part of the principal sudder ameen’s decision, which renders the estate liable for payment of the sum decreed.

The Construction cited by the respondents, No. 868, refers in our opinion to cases in which one and the same issue is before the court; for if a respondent were allowed to make objections to other points, the appellant would be placed in a most disadvantageous position, as he is not permitted to file a reply to respondents’ answer. The pleas of respondents cannot therefore be heard.

The Act (32 of 1839,) does not apply to the claim of appellant, which is for recovery of revenue paid to Government, as is evident

by close analogy to the provisions of Regulation 13 of 1808, and Act 1 of 1845. The appeal is therefore decreed; and the decision of the principal sudder ameen, rejecting interest, reversed. Costs of both courts in full awarded against respondents.

MR. HAWKINS.—I fully concur in the above judgment, but desire to add a word respecting Construction 868. I cannot understand how, on the respondents' answer to the petition of appeal put in by the appellant, the whole case is to be opened up, on points totally distinct from that on which the appeal is preferred. For instance, if the appellant appeal only on the point of costs, it surely cannot be permitted to the respondent to open up the whole case, without appealing himself. In the present case, the appellant appeals against the order of the principal sudder ameen refusing to allow him interest, on the insufficiency of the reasons given by that functionary, and the inapplicability of the law cited by him. On this the respondent wishes to open up the whole case. To allow this, would be to place the appellant in a most disadvantageous position. He sets forth in his petition of appeal the one point on which he appeals. The respondent, perhaps on the day of hearing, comes in with a reply which involves the whole case. No other pleadings are allowed, and thus the appellant is deprived of the opportunity of answering his adversary, and his pleader is totally unprepared for what he may now have to meet. The Construction appears to me to refer only to cases in which the general point at issue between the parties in appeal is one and the same, and the dispute between them, the extent or degree of liability with reference to that point. Such is the case put in the Construction, and care is necessary that the application of it is not stretched beyond the dimensions of the hypothetical case on which it is based.

THE 21ST JUNE 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE; and

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 400 OF 1847.

IN the matter of the petition of Rajah Dobraj Singh and others, filed in this Court on the 17th April 1847, (as per certificate) praying for the admission of a special appeal from the decision of the principal assistant commissioner of Hazareebaugh, under date the 29th January 1847; reversing that of the moonsiff of Khurrukdea, under date 10th March 1846, in the case of Tha-

koor Kunnaiha, plaintiff, *versus* Rajah Dobraj Singh and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

This was a suit for real property, instituted in the court of the moonsiff. After the pleadings were completed, the plaintiff filed a supplementary plaint, ostensibly for the purpose of correcting the valuation of his claim, but setting forth a great deal of matter in addition to what had before been stated by him. The agent of Hazareebaugh, on being applied to, states that the moonsiffs within his agency are guided by the rules of Regulation 23 of 1814. It has been ruled that a moonsiff, acting under that Regulation, cannot receive a supplementary plaint. The moonsiff, on the supplemental plaint being tendered, and on his being satisfied that it was essential to the correction of the plaint, should either have nonsuited the plaintiff, or have applied to his superior for instructions as to the removal of the suit to another court.

We accordingly annul both decisions, and remand the case to the moonsiff to be dealt with, with reference to the foregoing remarks.

THE 21ST JUNE 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 115 OF 1844.

Regular Appeal from a decision passed by Mr. C. Mackay, Principal Sudder Ameen of Zillah Mymensingh, December 28th, 1843.

NUB KOOMAR CHOWDHREE AND MUNNEE KUR-
NEEKA CHOWDHRAIN, APPELLANTS, (PLAINTIFFS,)

versus

COLLECTOR OF ZILLAH MYMENSINGH, JOOGUL
KISHWUR SEIN, TREASURER, MUSST. ROUSHUN
KHATOON, NOOR-O-NISSA KHATOON, AND TARA
MUNEE CHOWDHRAIN, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Gholam Sufdur.

Wukeel of the Collector, Respondent—Pursun Komar Tagore.

Joogul Kishwur, Treasurer—Defaulting.

Wukeel of Musst. Roushun Khatoon—Bunsee Buddun Mitr.

Wukeel of Noor-o-nissa Khatoon—Gokool Kishwur.

Wukeel of Tara Munnee ChowdhRAIN—Kishen Kishore Ghose.

THIS suit was instituted by appellants to recover the sum of Company's rupees 22,354-3-5, principal and interest, paid by them

into the collectorate to save from public sale their landed property, put up for sale by the collector on account of alleged sums embezzled by the respondent, Joogul Kishwur, while *khuzanchee*, or treasurer of the collectorate, and for whom appellants were sureties.

The appellants admitted their liability as sureties; but denied the truth of the embezzlement, insisting that the money said to have been embezzled, had been paid away by the treasurer on duly signed orders of the collector himself.

The collector declared the payments to have been improperly and fraudulently made by the treasurer.

The other respondents were sued, merely as the receivers of the monies paid away.

There was, therefore, only one issue or point for investigation, viz. the nature of the payment by the treasurer,—*bond fide* and authorized; or *malâ fide*, and unwarrantable.

The principal sudder ameen has in the following terms stated the point at issue, viz. whether the plaintiff can recover the amount claimed, and from all, or any of the defendants. *Secondly*, his decision, that they can recover it from the treasurer only; and, *thirdly*, his reason for the same, because he was the individual who embezzled it.

‘The point to be tried in this case, is, whether the plaintiffs can recover the amount sought for; and if so, against which, or all of them.

‘From a perusal of the papers and documents in the case, it appears to me to be clear that the plaintiffs can only recover the amount claimed from Joogul Kishwur, late treasurer; because he was the individual that embezzled that amount whilst collector’s treasurer. I therefore decree as follows:—that this suit be decreed in favor of plaintiffs against the *treasurer alone*; plaintiffs’ costs to be *paid by the treasurer, defendant*; the costs of the collector and other defendants, to be paid by the plaintiffs.’

There is no title of proof filed to shew that the treasurer was guilty of embezzlement. The payment of the monies is admitted by both parties. The plaintiff should have been called upon to file proof, that it had been made under duly signed orders of the collector; and the collector should have been called upon to prove that they had been made without due authority, and fraudulently. The case is therefore remanded for the principal sudder ameen to do as above intimated, and then decide.

THE 22D JUNE 1848.

PRESENT:

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

*Regular Appeal from a decision passed by the Principal Sudder
Ameen of Jessore, March 3d, 1846.*

CASE No. 104 of 1846.

GOOROODAS RAEI AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

RANEE KUTEEANEE, RESPONDENT, (PLAINTIFF.)

CASE No. 154 of 1846.

RAM RUTTUN RAEI AND OTHERS, APPELLANTS, (DEFEN-
DANTS,)

versus

RANEE KUTEEANEE, RESPONDENT (PLAINTIFF.)

*Wukeels of Appellants—J. G. Waller, Gobind Chundur Mookerjee,
Gopal Kishen Raei, Bunsee Buddun Mitr, and Ameer Ali.*

Wukeels of Respondent—T. C. Morton and Pursun Komar Tagore.

THE plaintiff's ancestor, in a case brought against the guardian of the defendants, disposed of in the Sudder Dewanny Adawlut on the 6th February 1834, (present: C. R. Barwell and N. J. Halhed, judges,) was ordered to take such measures as he thought proper to assert his right to the lands which form the subject of litigation in the present suit, in whatever court such suit could be brought.

Accordingly, on the 16th December 1835, he brought his action for possession and *wasilat* of the lands in question, and for reversal of the *lakhiraj* claim which the defendants set up.

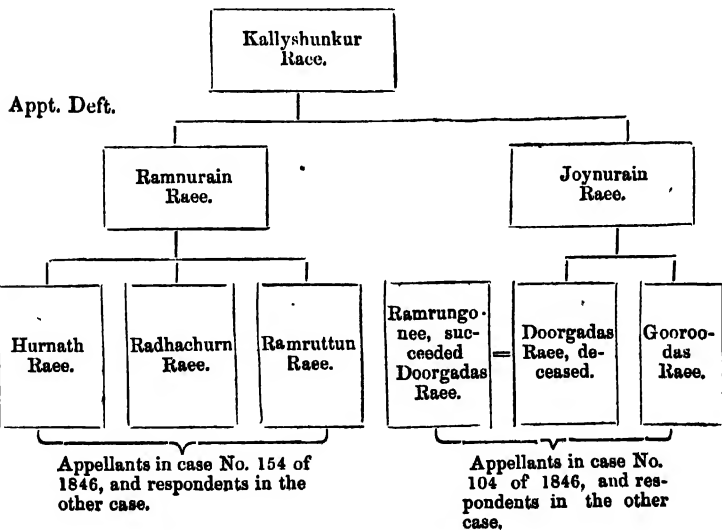
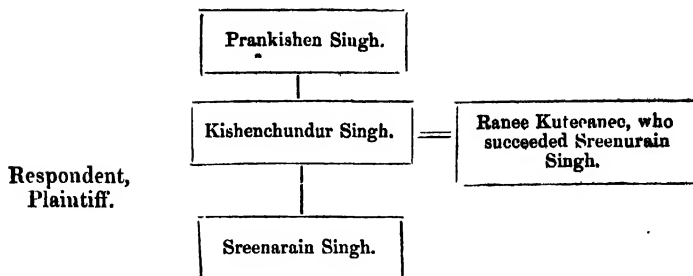
The defendants pleaded a *lakhiraj* tenure, also the statute of limitations.

On the 20th June 1837, the judge, after reference to the collector, threw out the defendants' plea of *lakhiraj* right, and decreed possession to plaintiff, and directed a separate suit should be brought for *wasilat*.

On this Ram Ruttun Raei and Hurnath Raei, *both absent* in the zillah, appealed.

The guardian of Gooroo Das and the other also appealed, having answered in the zillah.

The Court (present: Messrs. J. F. M. Reid, R. Barlow, and E. M. Gordon,) on the 6th January 1844, decided that the appellants had shewn no proof whatever of *lakhiraj* title; that plaintiff (respondent) was entitled to assess the lands in dispute, but not



entitled to be put in possession of them under the circumstances ; and they, accordingly, affirmed the decision of the judge of Jessore, and returned the case, ordering the deputation of an *ameen* to ascertain the amount of *wasilat* due to the respondent. On the receipt of the *ameen's* report, the judge was to dispose of the case.

On the 6th April 1848, applications for review of the Sudder's decree of 6th January 1844 were made by the appellants on the grounds :—

First, that *wasilat* is given, though right of possession is not awarded, and that the decree is conflicting and contradictory in its clauses ; that in cases of claim to lands, where the question of *mdl* and *lakhiraj* arises, it is not usual to give *wasilat*.

Second, plaintiff neither specifies the period, nor the amount of *wasilat* she claims ; nor has she sued on paper of proper value. The judge decreed possession to plaintiff, but *not wasilat*. Against this she brought no appeal.

In answer to the petition of the defendants for a review, the plaintiff urges that, from the 6th January 1844 to date, *four years and three months* have lapsed ; that under Clause 2, Section 4, Regulation 26 of 1814, a review is altogether inadmissible ; that Construction 490 requires satisfactory cause for delay in appeal to be shewn ; that defendants, ever since the Sudder Dewanny Adawlut's decree of 6th January 1844, have acknowledged it, and been parties to its execution now going on in the mofussil, objecting only to the amount *wasilat* to be fixed.

The object of the petitioners is to open up the whole case, and to have this Court's judgment of the 6th January 1844 amended. On full consideration of all that had been urged by the parties in the cause, Sir R. Barlow did not see any grounds for a re-hearing as to the merits, and rejected the applications.

The principal sudder ameen decided the question of *wasilat* on 3d March 1846, awarding the sum of 1,608 rupees per annum from Phagoon 1209 to 1242 against the defendants *jointly* ; and from 1243 to 1250 against Gooroo Das and Ram Rungonee at the same rate,—making a total of 53,332 rupees of joint responsibility against the defendants, and 12,864 rupees against Gooroo Das and Ram Rungonee, or grand total 66,196 rupees, with interest to date of realization, due to the respondent by the appellants. This order however seemed to require modification.

The proceedings of this case having extended over so long a period, commencing in December 1803, he deemed it expedient to give in a note as follows an epitome of them, in order to the better understanding of what is now before the Court.

Prankishen Singh, the father* of plaintiff's husband, Kishen Chundur Singh, sued Joynarain Raee and his father, Kalee

* Vide Genealogical Table.

Sunkur Raee, in the year 1803, in the judge's court at Jessore, with the view to re-annex certain *kismuts*, named Gobra, Brahmun Dunga, Satgunea, Andhar Koota, Bagundeea, and Dhoba Khola, (six in number) to his zemindaree *pergunnah* Nuldee, bought at public auction, which had been previously separated and declared a *mofussil talook* by the collector on the petition of Kalee Sunker, and recorded in the name of Joynurain Raee.

Joynurain claimed the above *kismuts* as his hereditary *talook*, which, under the orders of the collector and the Board of Revenue, had been declared an independent *talook*. The judge of Jessore, in 1806, annexed 4 of the 6 *kismuts*, viz. Gobra, Brahmun Dunga, Satgunea, and Dhoba Khola to the plaintiff's zemindaree *pergunnah* Nuldee; the other two, Andhar Koota and Bagundeea, remaining separated as before. This decision was upheld by the Calcutta court of appeal in 1808; and the respondent, the plaintiff, was directed to assess the lands according to *pergunnah* rates, under the law: the appellants to remain in possession. On appeal to the Sudder Dewanny Adawlut, the judges (present: J. H. Harington and J. Fombelle), on the 22d June 1814, confirmed the possession of the appellants in the 4 *kismuts* abovementioned; directing that, after the parties in the cause should have settled *between themselves* the amount *jumma* to be paid thereon, the judge was to prepare an account of collections for past years (commencing from the date of the zillah decree up to present date) in execution of judgment; and, after deducting the amount *sudder jumma* paid by the appellants to the collector of revenue, was to cause the remainder to be paid with interest from the close of each year, at 12 per cent. (*minus* costs with interest); and having carried out these instructions, was to send his report for final orders to the Court. Costs of all the three courts to be charged to the parties respectively. Should the respondent have recovered costs from the appellants in the courts below, the same to be re-paid.

On the 17th June 1818, the appellants petitioned this Court against the appointment of an *ameen* by the zillah judge, who, in collusion with respondent, was engaged in the measurement of certain rent-free and rent paying lands belonging to appellants and others, (in despite of objections raised by them) claiming them as belonging to the decreed lands. Petitioners stated they had offered to the judge 825 rupees, 5 *annas*, 10 *gundahs* as the *jumma* due on the said *kismuts*, prayed the *ameen* might be re-called, and that the above sum, *minus* expenses and *malikana*, might be awarded to the respondent. The judge however, on the ground that the Sudder's order decreed *jumma* according to *pergunnah* rates, rejected the petition.

The order for *pergunnah* rates, petitioners urge, was passed because, when the judgment of the Sudder was given, they, petitioners,

objected to the sum of 825 rupees, claimed in the plaint. As, however, they now agreed to pay that sum, inclusive of expenses, &c., petitioners urged there was no necessity for the deputation of an *ameen*, nor could respondent claim more than he had fixed himself: they therefore prayed that the above sum should regulate the demand for past years, and the *ameen* be removed. On this petition, Mr. J. H. Harington, judge (in his proceedings dated the 6th July 1818) recorded that neither a *jumma-bundee*, nor account of the rents payable by the *ryuts* then or for future years, nor measurement of lands was called for in his judgment of 1814, and that such was unnecessary to ascertain the amount of *jumma* to be paid by the appellants to respondent from the date of the zillah decree, (1806) to the date of execution of the Sudder decree. He prohibited the measurement and the fixing the *jumma-bundee* according to *pergunnah* rates; and directed payment to the respondent of such sum as by the *jumma wasil-bahee* papers might appear to have been collected by the appellants from the *ryuts* on the 4 *kismuts*, minus expenses, *malikana*, &c., and revenue paid to the collector. Should disputes arise between the parties as to the *jumma* for future years, the respondent was empowered to measure and assess under provisions of Clause 8, Section 15, Regulation 7 of 1799, and to bring an action for that purpose, if necessary. The judge was instructed to carry out the above orders; and to settle the amount *wasilat* to be paid to respondent, forwarding his report for final orders.

In 1825, Mr. Harington again took up the case, and records as follows:—

‘The judge’s return dated July 1824, in execution of this Court’s orders and proceedings of 1814 and 1818, forwarding the account of *kustabood*, (gross proceeds) and the *jumma wasil-bahee papers* of the 4 *kismuts*, Gobra, &c., from 1806 (September 22d) to the close of *Chey*t 1230, or 11th April 1824, received through Bhyrob Chundur Bose, guardian of the minor sons of Joynurain Raee, appellant, together with the depositions of 11 persons, who wrote the papers, having been laid before the Court, it appears that the judge has made account of *wasilat* due to respondent for 17 years and 7 months, amounting to 8,043 rupees, and 8 *annas*; which, after deducting 1,363 rupees for collections, &c., and 4,025 rupees, 15 *annas*, *sudder malgoozaree* (at 228 rupees, 15 *annas* per annum) leaves a balance in favor of respondent of 2,651 rupees, 4 *annas* principal, and 2,908 rupees, 7 *annas* interest thereon, or total 5,559 rupees, 12 *annas*, with costs of *ameen* and the Court amounting to 1,037 rupees, 13 *annas* recoverable from the heirs of the appellants. Further, it appears the collector of Jessore, in his *roobucaree* of 9th June 1824, states he measured and assessed the 4 *kismuts* in 1230, or 1824, fixing 1 rupee, 14 *annas* per *pakhee* on the land, making 4,740 rupees, 5 *annas* the *jumma* of the said *kismuts*; and, after

deducting 806 rupees for *malikana*, &c., assessing them at 3,934 rupees, 5 *annas* net for the current year, and giving notice of the same to appellants.'

'As it is impracticable to make out accounts for so long a period with greater precision than has already been done by the judge, his accounts for the *wasilat* for past years up to 1230, or 1824, as above, are sanctioned; and it is ordered that the sum of 5,529 rupees, 12 *annas*, principal and interest, be paid in execution of the decree to the heirs of the respondent, from the heirs of the appellants: further, report is required from the judge as to the 1,037 rupees, 13 *annas* charged to appellants as costs.'

An application for review of this order having been made to the Court by the collector, was rejected by Messrs. H. Shakespeare (in 1825) and Ross (in 1826.) Intermediately, Mr. Harington and Mr. C. Smith had given their opinions; but it is unnecessary to do more than allude to them, as the orders of Messrs. Shakespeare and Ross were made final; and, in execution thereof, Bhugwan Chunder Bose, guardian of the minor, the zemindar's son, gave in his receipt for the *wasilat* (principal and interest amounting to 6,493 rupees) from 1213 to 1230 on the 4 *kismuts*, which document bears date the 29th April 1826.

It has already been mentioned that the collector of Jessore, on the part of the court of wards, measured and assessed the lands in 1230. He obtained summary decrees against the appellants' guardian, Bhyrob Chundur Bose, for rents for the year 1231; and subsequently, on a revised *jumma*, for 1232-33-34 and 1235 on re-measurement, made by the judge under order of the court of appeal through Reedhae Kishen Ghose and Susteedhur Raee, *ameens*, in 1827, amounting in the total to 11,865 rupees: upon which Bhyrob Chundur instituted a regular action for reversal of these decrees, on the 13th August 1830, in the Calcutta provincial court. Mr. Charles Middleton, before whom the case was laid on the 6th June 1831, was of opinion that the summary awards should be set aside with reference to the explanatory order, (passed by Mr. J. H. Harington) of the 6th July 1818, directing the respondent, should the question of the *jumma* to be paid in future arise, to sue *de novo* for its adjustment. It only remained to be decided whether *all* the lands measured by the *ameens* under the zillah judge's order could be assessed or not; and whether the *jumma-bundee* prepared by the judge was correct, and in accordance with the order of the Sudder Dewanny Adawlut.

It appeared that the *ameens* measured 105 *khadehs*, 10 *pakhees*, 7 *kannees* of lands: of which 25 *khadehs*, 13 *pakhees*, 1 *kannee*, 15 *gundahs* were claimed by other claimants as *lakhiraj*, and as their own property,—17 *khadehs*, 14 *pakhees*, 9 *kannees* were claimed by appellant, as *lakhiraj*,—27 *khadehs*, 22 *kannees*, 3 *reyys* were claimed as attached to his ward's *talook*, *kismuts* Khelsa Khalee and Andhar

Koota, and separate from the villages in dispute,—and 32 *khadehs*, 5 *pakhees*, 20 *kannees*, 3 *reygs* he alleged were measured in his absence, which appellant also claimed as *lakhiraj*. In proof of these allegations, appellant produced copy of a list of *taeedads* (*teyrij taeedad*) signed and sealed by the collector. Hence there are 83 *khadehs*, 1 *pakhee*, 23 *kannees*, 2 *reygs* of disputed land, and 22 *khadehs*, 8 *pakhees*, 14 *kannees*, 5 *gundahs* of land *not* disputed. The judge ought, under Sections 29 and 30, Regulation 2 of 1819, to have instructed the plaintiff in the zillah (the guardian of respondent) to sue for resumption of the said lands, and have summarily assessed only the lands not in dispute. The judge, however, has assessed *all* the land measured by the *ameens*, which he estimates to be 95 *khadehs*, 11 *pakhees*, 14 *kannees*, 1 *reyg*, and 18 *gundahs*; this is opposed to Regulation 2 of 1819, and the Circular Order 25th February 1831. It appears also from the papers in this case, especially from the *roobukarees* of the Sudder Dewanny Adawlut (dated 6th January and 27th September 1825, and the 3d January 1826) that the judges of that Court fixed the amount of *wasilat* of the disputed *kismuts* for 17½ years, *i. e.* from 1213 to 1230, as per *jumma wasil-bakee* papers and *hustabood* put in by plaintiff, Bhyrob Chundur, (the guardian); these were proved by the evidence of the *gomashtras* and other witnesses, and showed 457 rupees to be the annual gross produce; and that amount was accordingly awarded to the zemindar, who now wishes to assess at the rate of 1 rupee, 14 *annas* per *pakhee* on the land measured by the *ameens*. If the rate of 1-5 be sanctioned (plaintiff says) upon the *undisputed* land, the above 457 rupees will be the amount of its *jumma*; hence there is a difference of 9 *annas* per *pakhee* between the parties. Mr. Middleton then fixes the rate at 1 rupee, 9½ *annas* per *pakhee*, setting aside the rates named by both parties. He disallows the claim of the defendant founded on the summary decrees at 2,383 rupees, 11 *annas*, 15 *gundahs* per annum, subsequent to 1231, as up to that period defendant had received *wasilat* at the rate of 457 rupees per annum, and decrees as follows:—‘The judge of Jessore’s summary decrees are amended; the plaintiff must pay 574 rupees, 8 *annas*, minus 97 rupees, 12 *annas* for *malikana* costs, &c., being 476 rupees, 12 *annas* per annum, as *malgoozaree* of 22 *khadehs*, 8 *pakhees*, 14 *kannees* undisputed land to the defendant, from 1231 to the present date, with interest at 12 per cent. Costs to be rateably charged.’

Sreenurain Singh, dissatisfied with the above decision of Mr. Charles Middleton, appealed to the Sudder Dewanny Adawlut on the 23d September 1831, and the case was taken up by Mr. Braddon on the 7th October 1833. It was afterwards laid before Mr. Halhed on the 31st December 1833, and finally before Mr. C. R. Barwell on the 6th February 1834; and was disposed of

by the two last named judges, whose decisions overruled that of Mr. Braddon.

Mr. Braddon was of opinion that the rate of 1 rupee, 9½ *annas* per *pakhee*, fixed by Mr. Middleton, was altogether arbitrary and without data: on the contrary, decrees of court shewed that, in *pergunnah* Nuldee, the rate of 1 rupee, 14 *annas* per *pakhee* had been awarded to Joynurain and the guardian of the respondent. He therefore amended Mr. Middleton's decision in this respect, but, at the same time, upheld it in the matter of the *lakhiraj* lands claimed by the respondent; and awarded rents on the 22 *khadehs* undisputed land at the rate of 1 rupee, 14 *annas* per *pakhee*, from 1231 to the date on which the amount of the summary decrees was deposited in the zillah court, with permission to appellant to sue in whatever court he pleased for the lands now deducted on the *lakhiraj* claims preferred by the respondent, and similar permission to the respondent to sue for the purpose of reducing the rate of 1 rupee, 14 *annas* per *pakhee*, if he thought it excessive. The case was then sent on for another voice.

Mr. Halhed, on the 31st December 1833, concurred with Mr. Braddon in excluding the disputed lands from the lands measured by the *ameens*, and proposed to have those undisputed (being 22 *khadehs*, &c.) properly assessed; granting permission to the appellants to sue the holders of the *lakhiraj* lands.

On the subject of the rate per *pakhee*, Mr. Halhed observed, that fixing 1 rupee, 14 *annas* per *pakhee* was opposed to the Sudder Dewanny Adawlut's decrees of 1814 and 1818, which directed that the party claiming to assess must proceed according to law, and sue under the provisions of Clause 8, Section 15, Regulation 7 of 1799, to measure and assess the undisputed land, which course he had not adopted. The summary decrees from 1231 to 1235 were given without reference to the quality of lands, and the rates of each description of land, and are opposed to the decrees formerly passed by this Court. The Calcutta court of appeal's decree he held to be equally deficient in this respect. The point at issue between the parties to the cause, viz. the rate at which the lands were to be assessed, was still as before unadjusted. He therefore amended Mr. Middleton's decree; and, differing from Mr. Braddon, sent on the case with the view to the reversal of the summary decrees, and so much of the court of appeal's decree as fixed the rate per *pakhee* on the undisputed land; granting permission to the appellant to assess the undisputed lands in the litigated *kismuts* referred to in the Sudder Dewanny Adawlut's orders of 1814 and 1818, being 22 *khadehs*, 8 *pakhees*, 14 *kannees*; and further permission to him to sue for the disputed lands in whatever court he pleased. Till the proper amount of *jumma* be established, the appellant was to receive the

same rent for the disputed *kismuts* as he got before the summary decrees for the years 1231 to 1235 were passed, and any sums received in excess to be repaid to the respondent with interest. Costs charged to the appellant.

Mr. C. R. Barwell concurred with Mr. Halhed ; and their judgments were made final on the 6th February 1834 as already stated.

In consequence, and in execution of the Court's orders above indicated, the *present* plaintiff (respondent) instituted a suit on the 16th of December 1835, for possession of 1,205 *biggahs* and 19 *cottahs*, with *wasilat*, of the land claimed by the defendant as *lakhiraj*, situate in the *kismuts* Gobra, &c. These lands are comprised in the two parcels, (17 *khadehs*, 14 *pakhees*, 9 *kannees*, and 32 *khadehs*, 5 *pakhees*, 20 *kannees*, 3 *reyys*) referred to in Mr. Middleton's *roobucaree* of the 6th of June 1831. The Court's decision of this case* was given, as already shewn, on the 6th January 1844,

* *Regular Appeals from the decision of the Additional Judge of Jessore.*

Baboo Ram Ruttun Raee, Appellant, Gooroo Das Raee and Musst. Ram Rungonee,
widow-of Doorga Das Raee, Appellants.

versus

Sree Nurain Singh, and after his death Raneer Kuteeaneer, Respondent.

The respondent, Sree Nurain Singh, the *zemindar* of *pergunnah* Nuldee, instituted this suit, on the 16th December 1835, to obtain possession of, together with *wasilat*, certain *kismuts*, (Gobra &c.) containing 1,205 *biggahs*, 19 *cottahs* of land, (laying his suit at Sicca rupees 12,059-8-0-0, the selling price thereof) from the appellants in these two appeals.

The respondent pleaded, that on the institution of a suit by his father, Kishen Chundur Singh, against Jye Nurain Raee, the Sudder Dewanny Adawlut on the 22d June 1814, (present : J. H. Harington and J. Fombelle) decreed that the four *kismuts* in question, which had been separated from his *zemindaree* of *pergunnah* Nuldee, should be re-annexed to it, and that the rent thereof should be paid according to the *pergunnah* rates. Kishen Chundur Singh took out an *ameen* to fix the rent, and the defendants then claimed the lands as their *lakhiraj*. The case having come before Mr. Harington, he, on the 6th July 1818, recalled the *ameen*, and declared the *zemindar* entitled to assess under Clause 8, Section 15, Regulation 7, 1799, and Section 8, Regulation 5, 1812 ; and in failure of payment, to sue to recover the amount. The estate having been brought under the court of wards, the collector, through his *ameens*, measured the four *kismuts*, when a *jumma* of 3,934-5-12-2 was assessed on 158 *khadehs*, 5 *kannees*, 2 *reyys*, and 10 *cowries*. On this, process was issued against Bhyrob Chundur Bose, guardian of Doorga Das and Gooroo Das, and against Ram Nurain, father of Ram Ruttun Raee, Radha Churn Raee, and Hurnath Raee, under Regulation V., 1812. They did not attend ; on which Bugwan Chundur, *surburakar* of the court of wards, sued summarily to recover 3,934-5-12-2, the balance of 1231, which sum was decreed by the judge with interest. An appeal having been preferred to the provincial court of Calcutta, the judge's order was reversed, and he was directed to cause the lands to be re-measured before both parties and the *ryots*, and a new assessment made. On this Reedhaee Kishen Ghose and Susteethur Raee were deputed as *ameens*, who measured a portion of the contested lands ; and, on their report, the *surburakar* demanded as the rent of 95 *khadehs*, 14 *pakhees*, 1 *reyy*, 5 *gundahs* at 1 rupee, 14 *annas* per *pakhee*, after deducting *malikana*, the sum of Sicca rupees 2,873-15-3, and obtained a summary decree for the balances of 1231 to 1235, both inclusive. Bhyrob Chundur, dissatisfied with this, instituted a regular suit in the Calcutta provincial court to recover 13,627-0-12-3, the amount summarily awarded by five decrees.

Mr. Middleton, on the 6th June 1831, decreed, awarding to the *zemindar* the sum of Sicca rupees 476-12, at 1 rupee, 94 *annas* per *pakhee*, annual *jumma* of 22 *khadehs*, 8 *pakhees*, 14 *kannees*, acknowledged by the appellants to be in their possession ; and

The appellants were allowed, under the peculiar circumstances of the case, to retain possession of the disputed lands. The respondent's right to assess them was acknowledged, and an *ameen* was ordered to report the amount *wasilat* due to her; on the receipt of which the judge was directed to pass such orders as he might think proper.

The *ameens'* report having been filed before the principal sudder ameen, to whom the investigation of the case was made over by the judge of Jessore, two appeals against his award (dated March 1846) of 66,196 rupees, with interest, in favor of the respondent, have been preferred by Gooroo Das Raee and Ram Rungonee Dasse, widow of Doorga Das Raee, on the one part, and by Ram Ruttun Raee and others, on the second part. The object of *both* parties is to defeat the claims of the respondent. But they are also at variance as to their respective responsibilities; each claiming exemption from liability.

in regard to the remainder, claimed as *lakhiraj*, referred the zemindar to another action.

In appeal to this Court, Messrs. Halhed and C. R. Barwell, on the 6th February 1834, reversed so much of the decree as fixed the rate of 1 rupee, 9½ *annas* per *pakhee* for the acknowledged land; and ordered the appellants to fix a proper *jumma* on the non-disputed lands, under the proceedings held by Mr. J. H. Harrington on the 22d June 1814, and 6th July 1818. With respect to the disputed lands, they ordered the zemindar to do the best he could to establish his right.

The respondent, accordingly, sued for possession of 17 *khadehs*, 14 *pakhees*, 9 *reyys* measured in the presence of the defendant, and also 32 *khadehs*, 5 *pakhees*, 20 *kannees*, 3 *reyys* not so measured; total 50 *khadehs*, 3 *pakhees*, 29 *kannees*, 3 *reyys*, containing 1,205 *biggahs*, 19 *cottahs*, with *wasilat* for past years.

Of the appellants, Ram Ruttun Raee, Radha Churn Raee, and Hurnath Raee did not appear in the *zillah* court. The other appellants, Doorga Das Raee and Gooroo Das Raee, failed to appear before the collector, to whom the case was referred for report under Regulation 2, 1819, and before the *zillah* court, till the 20th June 1837, when the suit was decided *ex parte*, after it had been pending in the court upwards of 18 months. They pleaded that the lands in question were their hereditary *lakhiraj* property.

The additional judge of Jessore, Mr. Charles Garstin, on the 20th June 1837, on a report of the collector, passed a decree rejecting the claim of the appellants to hold the land as *lakhiraj*, and decreed possession to the respondent, but referred him to a separate suit for *wasilat*.

From this decision two appeals were filed, viz., No. 265 of 1837, by Ram Ruttun Raee and Hurnath Raee; and No. 267 of 1837 by Gooroo Das Raee and Ram Rungonee, widow of Doorga Das Raee, who had demised; and the appeal was defended on the death of Sree Nurain Singh by his mother, Ranee Kuteeanee.

Under the peculiar circumstances of this case, the Court deemed it inexpedient to proceed under the provisions of Circular Order of 12th March 1841, (No. 141, vol. III, page 187.) They therefore proceed to try the case on its merits. They are of opinion, that the title of the appellants, to hold the lands in litigation as *lakhiraj*, has been disproved by decisions in the special commissioner's court. The respondent's right of assessment they consider fully established, and accordingly authorise the respondent to assess the lands under Regulation 5 of 1812; but they do not consider her entitled to be put in possession of the lands. Thus modifying the decision of the court below, this Court remands the case for the disposal of the point regarding *wasilat*, directing that an *ameen* be deputed for the purpose of ascertaining how much is due to the respondent. On the receipt of the *ameen's* report, the judge will pass such orders as he may think proper.

Before I enter upon the question of *wasilat*, for what period, to what amount, and by whom it is to be paid, (a question to be decided when the case shall be brought before a full bench of the Court), I beg to lay before my colleagues, in a few words, the grounds on which I, as the only judge now on the bench by whom the decision of the 6th January 1844 was passed, object to admission of a review of the judgment of that date on its merits, *quoad* the *wasilat*, the payment of which the petitioner objects to altogether.

In the original cause decided by the judge of Jessore in 1806, in favor of respondent's ancestor, which decision was confirmed in 1808 by the Calcutta court of appeal, and in 1814 by the Sudder Dewanny Adawlut, the appellants' ancestor made no mention of *lakhiraj* lands, but defended the suit entirely on the plea that the *kismuts* in question were his hereditary and independent *talook*. Four out of the six *kismuts* were decreed to the respondent's ancestor by the Jessore judge; and it is not till the year 1830, (i. e. after the parties had been in court for the space of 24 years,) that we hear any thing specific and direct as to the appellants' claim to *any lakhiraj* lands, save incidentally in 1818, and also in a petition presented to the measurement *ameens*, Reedhaee Kishen Ghose and Susteedhur Das, deputed by the judge previous to his passing the summary decisions for rents of 1231 to 1235, corresponding with A. D. 1824 and 1828. It was before Mr. Middleton that the plea of the lands (the *wasilat* of which is now sought under the decretal order of January 6th, 1844), being distinct and separate from the lands awarded by Messrs. J. H. Harrington and J. Fombelle, in 1814, was first urged. The judges, who presided on the 6th January 1844, could not understand how the Calcutta court of appeal could hold a copy of list of *tacedads*, filed too in an action for reversal of summary awards for rent, to be proof of boundaries, and of lands then first claimed as being distinct and not included in the Sudder Dewanny Adawlut's judgment of 1814. On the provincial court records, there is not a single document to prove the fact. The lands claimed as *lakhiraj* by the appellants, were exempted from the operation of the Sudder's decree on the bare assertion of their being distinct lands from those included in the four *kismuts* decreed in 1814, which, as already stated, were measured by the *ameens*, and for the rents of which the summary decrees were awarded in the *zillab*, though the judge's decision was amended by the Calcutta court of appeal. It has been seen, that Mr. Middleton in his decree made no provision for the settlement of the question as to the right to the *lakhiraj* lands claimed by the appellants. This omission was, however, supplied by the judges of the Sudder Dewanny Adawlut in 1833 and 1834, when the plaintiff, (respondent) in 1835, in con-

formity with the Court's order, sued to recover possession with *wasilat*, and the defendants (appellants) pleaded their *lakhiraj* rights. The identity of the lands, and the fact that they were included in the measurement of the *ameens*, Reedhaee Kishen Ghose and Susteedhur Raee, as being in their the four *kismuts* decreed in 1814 was admitted in the pleadings. The point at issue was, whether they were in fact within, or beyond, that decree; and as no proof of the existence of any *lakhiraj* land, the property of the appellants, was adduced, the secondary question as to boundaries necessarily fell to the ground; and this Court, on the 6th January 1844, decreed in favor of the respondent, awarding *wasilat* for past, and directing assessment for future years.

The issue now before us is, by whom, at what rates, and for what period, *wasilat* shall be paid. It has been above stated, that the principal sudder ameen, on the 3d March 1846, has awarded *wasilat* against the appellants, jointly and severally, as detailed at the beginning of this note for 41 years to the extent of 66,196 rupees, with interest to date of realization. The appellants have filed a receipt, dated 18th Bysack 1233, or 29th April 1826, signed by Bhugwan Chundur Bose, then guardian of plaintiff, for 6,493 rupees, *wasilat* with interest due on the 4 *kismuts* from 1213 to 1230, paid by Bhyrob Chundur Bose, the then guardian of appellants. They have also filed copy of statements made by two *wukeels* of the respondent in the principal sudder ameen's court (in reply to interrogatories put by that officer) dated the 16th May 1839, in another case in appeal for 600 *biggahs* connected with and depending on the decision of this appeal, admitting that the respondent had received *all the wasilat of the 4 kismuts* up to 1230. The genuineness of this receipt is not impugned by the respondent; but an endeavour is made to prove that it has no reference to the lands in dispute, but to *other lands*. If such be the fact, I would ask where is the decree of court, awarding those lands, that *wasilat* should be given on them? The plaint in this case distinctly is founded on the decision of the Sudder Dewanny Adawlut of 1814, and the subsequent proceedings in execution of that decree dated in 1818, 1825, and 1826; and this *new* plea, first brought forward in the principal sudder ameen's court in June 1845, is urged to avoid the operation of the receipt of 1826, by which the amount *wasilat* for a period of 19 years must be deducted (i. e. from 1209 to 1230,) from the amount now awarded by the principal sudder ameen. I entertain no doubt whatever of the genuineness of this deed, and that it covers *all* the *wasilat* due on the lands up to 1230, which were included in the 4 *kismuts* decreed in 1814; but for which it became necessary that the plaintiff (respondent) should sue as directed by Messrs. Halhed and Barwell in 1834 and 1835, on the new plea set up by the defendants (appellants) of a *lakhiraj* right.

I therefore propose to enquire what amount is due, and by whom, from the year 1231. From the judgments of Messrs. Halhed and C. Barwell, I gather that the appellants were required to pay the *jumma* that they paid before the summary decrees for 1231 were passed by the zillah judge. From Mr. J. H. Harington's proceedings of 1825, I find 228 rupees per annum declared to be the *sudder jumma* on the 4 *kismuts*, Gobra, &c., when they formed an independent *talook* paying direct to Government. To use the words of Mr. Harington, 'to prepare an account of *wasilat*, after the lapse of so long a period, is impracticable; and the only mode of fixing the amount recoverable from the appellants from 1231, onwards, is to ascertain the rates per *biggah* of the lands now decreed.' Such was the recorded opinion of Mr. J. F. M. Reid and of myself in our proceedings of December 15th, 1845, and of the 7th of February 1846, in reply to the principal *sudder ameen's* *roobukaree* of reference, (as to how *wasilat* was to be made) of the 12th November 1845. The rate of 1 rupee, 14 *annas* per *pakhee*, at which rate the principal *sudder ameen* has assessed the lands, I am of opinion is, with reference to what has been above recorded, a just and equitable assessment, and I would uphold his order so far; but, for the reasons I have given, I propose to amend his decision, charging the appellants for *wasilat* from the year 1231 only, not from 1209 to 1250 as awarded by the principal *sudder ameen*.

It now only remains to determine by whom this *wasilat* is to be paid; and I would here state that I adopt the term *wasilat* (in contradistinction to its usual acceptation), as implying the amount rent due by the appellants, during their occupation of the lands, which, under the present decretal order, are the right of the respondent, by whom the whole revenue of *pergunnah* Nuldee, in which the decreed lands are included, was paid to Government. Commencing then the account of *wasilat* from the year 1231, (not from 1209 as proposed by the principal *sudder ameen*) it is in the first place to be seen, who is answerable for the *wasilat* from that period up to 1242.

The appellants, Gooroo Das and Ram Rungonee, urge that their co-defendant, Ram Ruttun, is, up to 1242, responsible for the *wasilat*: in proof they refer to his father, Ram Nurain's, objections put in in 1233, before Reedhaee Kishen and Susteedhur, *ameens*, claiming the lands in dispute as his *lakhiraj dewutur*, and in his own possession. They also refer to the *mojibat*, or grounds of appeal, filed by Ram Ruttun and others in this Court, in the case decided in January 1844, as setting forth their possession and that of their father, independent of any sharers. They state, that on the death of their father, Joynurain Rae, in 1229, Ram Nurain, uncle of Gooroo Das, caused Bhyrob Chundur Bose, his sister's son, to be appointed guardian of the said Gooroo Das and Doorga Das, the husband of Ram Rungonee; but that he (Ram Nurain)

in fact conducted all matters of business, and collected the rents. Ram Ruttun succeeded him, and was similarly at the head of affairs. Neither Gooroo Das nor Doorga Das enjoyed any of the profits. On attaining majority, they got possession of some *mehals* under Regulation 15 of 1824. After this Doorga Das died, and Ram Rungonee succeeded him.

The appellants, Ram Ruttun, Hurnath Raee, and Radha Churn Raee, on the other hand, claim exemption from payment of *wasilat*. Joynurain Raee, the father of Gooroo Das Raee, in 1209 had the *talook* separated; all process on the part of the plaintiff, and plaintiff's ancestors, has invariably issued against Joynurain and his heirs, or their guardians. The *wasilat* made under decree of 1814 was calculated according to their guardian, Bhyrob Chundur Bose's, papers; and although the *surburakar*, Bhugwan Chundur Bose, of plaintiff's minor son, Sree Nurain, did sue both Ram Nurain, Ruttun Raee's father, together with Bhyrob Bose, Gooroo Das Raee's guardian, for rents from 1231 to 1235, the judge of Jessore decreed against Bhyrob Bose only, who alone sued for reversal of the summary order in the courts; and, in 1834, Messrs. Barwell and Halhed, amending the decisions of the court below, ordered repayment to Bhyrob Bose of the surplus he had deposited. Further, in a suit under Regulation 15 of 1824 (between Ram Ruttun and others *versus* Bhyrob Bose, the *surburakar*) decision was given in favor of the latter in 1837, on proof of possession for years past; and, lastly, that the report of Teelook Chundur Sein, deputed by the principal sudder ameen to fix the amount *wasilat* now the subject of dispute, clearly shews that Doorga Das and others, and their ancestors, all along have held possession of the lands on which *wasilat* is claimed, as distinctly acknowledged in the answer filed in the case decided in January 1844.

From the above abstract, it is established that both parties have repeatedly pressed on the courts their rights to the lands, and also avowed their possession of them from time to time, as it appeared to them necessary and expedient to make such declaration. For the purposes of this suit, I am of opinion that it is sufficient for the Court to confine its judgment to a general award against the appellants, collectively, from 1230 to 1242, from which period I propose to hold Gooroo Das and Ram Rungonee responsible under the magistrate's order for possession, which they executed in 1837. Could it have been proved satisfactorily from what period to what period the parties respectively had held and enjoyed the proceeds now claimed, that question might have been settled *now*; but the issue between the appellants and respondent is more properly drawn in this case, when the point is restricted to the question of the liability of the appellants, jointly and severally, to the respondent, leaving the appellants to adjust their disputes between themselves.

By the Court. Application for the review of this Court's judgment of 6th January 1844 (present Messrs. J. F. M. Reid,

R. Barlow, and E. M. Gordon,) having been rejected by Sir Robert Barlow, on the 27th of April last, the Court restrict their investigation to the points on which the case was sent up for the consideration of a full bench in Sir R. Barlow's minute of the 8th instant. It will be seen by reference to that minute, that the appellants, Gooroo Das Raee, Ram Rungonee, Ram Ruttun, and his brothers, have made two separate appeals against the decision of the principal sudder ameen of Jessore dated the 3rd March 1846, awarding the sum of 66,000 rupees against them as *wasilat* of certain lands in Gobra, &c., (four *kismuts*,) decreed to the respondent on the 6th January 1844. The particulars of the principal sudder ameen's order are recorded in detail in the abstract of the case prepared by Sir R. Barlow; it is unnecessary therefore to recapitulate them in this place. We therefore proceed to enquire by whom, for what period, and at what rates the *wasilat*, already decreed to the respondent, is to be paid.

We are of opinion that the respondent is not entitled to recover from the appellants any rents previous to the year 1231, inasmuch as the receipt of the 18th Bysack 1233, or 29th April 1826, signed by Bhugwan Chundur Bose, the guardian of respondent's minor son, Sree Nurain Singh, for the rents of the four *kismuts* up to the year 1230, has been filed and proved on the record; and, further, the receipt of *all* the rent on these four *kismuts* is acknowledged by two *wukeels* on the part of the respondent in the principal sudder ameen's court, on the 16th May 1839. The genuineness of the deed is not denied, but the respondent now pleads that the rents of the decreed lands were not included in the accounts which formed the basis of the adjustment in 1826. It is, however, to be observed, that the receipt is on the face of it a full release for all claims for rent up to 1230, in execution of the decree of 1814; and that up to the present period, no objection of the nature now offered has ever been raised.

From the year 1231 to the year 1242, we hold all the appellants, jointly and severally, liable to the respondent. An endeavour has been made by the heirs of Joynurain Raee, to throw a portion of the responsibility on the heirs of Ram Nurain; while the latter, who have all along claimed the lands as their own, now utterly disclaim their liability. It is only, however, within the last two years, subsequent to the case having been remanded to the lower court for the special purpose of investigation on the subject of *wasilat*, that the heirs of Ram Nurain have denied their former statements, and claim exemption from responsibility on the plea of never having held the lands in their possession. Ram Ruttun and his brothers, though they did not attend as defendants in the first instance before the judge of Jessore, did appear in this Court in appeal against his order, and most emphatically pleaded their claim to the lands,—called them their own, independent of any

co-sharers,—urged that they were hereditary, and that they had all along collected the rents on them. Similar pleas were urged by the heirs of Joynurain Raee. The Court will not, however, allow parties to come in upon pleas so entirely opposed one to the other, or give them the opportunity of thus avoiding the consequences of their own admissions.

In 1243 the families separated; and as the heirs of Joynurain Raee acknowledge their undivided responsibility from that period, they of course must be held liable for the rents from 1243 to 1250 B. S.

The last point to be disposed of is, the rate at which the rents of past years are to be estimated. The principal sudder ameen has calculated them at the rate of 1 rupee, 14 *annas* per *pakhee*, net: to which the appellants object, alleging that a deduction therefrom should be allowed on account of expenses of collection and *malikana*. The Court find, on reference to the record, that 1 rupee, 14 *annas* per *pakhee* is the rate at which the *talookdars* in *pergunnah* Nuldee pay to the zemindar, exclusive of costs of collection and *malikana*; nay more, it appears that the appellants themselves, since the decision of 6th January 1844, have engaged for the lands with the respondent at the above rate. They therefore see no reason to interfere with the principal sudder ameen's estimate in that respect.

With reference to the objections raised by the appellants, as to the want of stamp of proper value to cover the amount *wasilat* decreed, the Court observe that at the time this action was instituted, the courts, commonly, in a suit for possession of landed property with mesne profits, awarded the same without reference to the stamp on which such suit was brought, provided it was sufficient to cover the value of the land sued for; and, in execution, mesne profits were given without requiring additional stamp. Moreover, the present case is one of a peculiar nature. The respondent's right to *wasilat*, or more properly rent, was declared so far back as 1814; and the enforcement of that right was only kept in abeyance by objections having been raised by the appellants, involving uninterrupted litigation from that period to this date. The recent decisions of the courts having established that the lands which were in dispute are within the four *kismuts* decreed to the respondent in 1814, the Court consider her entitled to *wasilat* thereon from the period which they have fixed, in virtue of the original decree passed by the Sudder Dewanny Adawlut in the abovementioned year.

Under the above circumstances, the Court amend the principal sudder ameen's decision of the 3d March 1846, as follows:—the appellants are to pay, jointly, from 1231 to 1242 inclusive, at the rate of 1,608 rupees per annum, being 1 rupee, 14 *annas* per *pakhee*; and the appellants, Gooroo Das Raee and Ram Rungonee, from

1243 to 1250 at the same rate, with interest from the date of the principal sudder ameen's decree as it is now amended. Costs of the suit, up to the 6th of January 1844, to be paid by the appellants, and from that date by the parties proportionably.

THE 22^D JUNE 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

*Regular Appeals from a decision passed by the Principal Sudder
Ameen of Jessore, September 3d, 1846.*

CASE No. 248 OF 1846.

GOOROODAS RAE AND MUSST. RAM RUNGONÉE
DASSEE, APPELLANTS, (DEFENDANTS,)

versus

RANEE KUTEEANEE, RESPONDENT, (PLAINTIFF.)

*Wukeels of Appellants—J. G. Waller and Gobind Chundur
Mookerjee.*

Wukeel of Respondent—Pursun Komar Tagore.

CASE No. 249 OF 1846.

RAM RUTTUN RAE, HURNATH RAE AND RADHA
CHURN RAE, APPELLANTS, (DEFENDANTS,)

versus

RANEE KUTEEANEE, RESPONDENT, (PLAINTIFF,)

GOOROODAS RAE AND MUSST. RAM RUNGONÉE
DASSEE, RESPONDENTS, (DEFENDANTS.)

*Wukeels of Appellants—Ameer Ali, Bungsee Buddun Mitr, and
Rampran Rae.*

Wukeel of Respondent Ranee Kuteeanee—Pursun Komar Tagore.

CASE No. 254 OF 1848.

RANEE KUTEEANEE, APPELLANT, (PLAINTIFF,)

versus

RAM RUTTUN RAE, HURNATH RAE, RADHA CHURN
RAE, GOOROODAS RAE, AND MUSST. RAM RUN-
GONÉE DASSEE, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Pursun Komar Tagore.

*Wukeels of Respondents—J. G. Waller, Ameer Ali, Gobind Chun-
dur Mookerjee, Rampran Rae, and Bungsee Buddun Mitr.*

THESE appeals were referred to a full bench by Sir Robert Barlow with the following note :—

" These are three appeals against the decision of the principal sudder ameen of Jessore, dated the 3d September 1846, awarding *wasilat* to the plaintiff from 1231 to 1242, at 826 rupees per annum, or 9,912 rupees, 1 *anna*, with interest to date of realization, against all the defendants; and from 1243 to 1250, being 6,100 rupees, 11 *annas* similarly calculated, against two of the defendants only, Gooroo Das Raee and Musst. Ram Rungonee, on the lands herein-after mentioned.

" Mr. A. Dick, one of the judges of this Court, awarded to the plaintiff her right in 619 *biggahs*, 12 *cottahs* of land in the 4 *kismuts*, (Gobra, &c.), referred to in the proceedings of the Court in the cases,* Nos. 104 and 154, between the same parties. This order was passed on the 2d April 1840, on rejection of a petition of appeal against the decision of the principal sudder ameen, dated the 18th May 1839, presented by Gooroo Das Raee. Another petition, against the above last mentioned decision of the principal sudder ameen, was also preferred by Ram Ruttun and others, and was similarly rejected by Mr. Dick on the 24th July 1840,—the principal sudder ameen's judgment being upheld in its integrity. The order is to the following effect, and is *ex parte* though the appellants' *wukeel* was present:—

" The plaintiff, now respondent, is to take possession of the disputed lands as per the measurement *chittahs* of Reedhaee Kishen and Susteedhur Das. As however, up to the present date, they have been in occupation of defendants, now appellants, if they are willing to pay to the respondent the proper *jumma*, according to *pergunnah* rates, the respondent is to enter into engagements with them; otherwise respondent may act as she pleases in this matter.'

" Costs were awarded against certain defendants, and plaintiff (respondent) was permitted to sue for *wasilat* of past years, separately.

" On the 10th March 1846, plaintiff (respondent) accordingly sued the defendants (appellants) Gooroo Das and others, and Ram Ruttun Raee and others, in the *zillah* for the *wasilat* of the above 619 *biggahs*, at the rate of 1 rupee, 14 *annas* per *pakhee*. The defendants did not agree to pay the *jumma* as directed by the principal sudder ameen, in consequence of which plaintiff was about to carry into execution the principal sudder ameen's judgment giving her right of possession to the lands, when Gooroo Das came forward on the 5th September 1843, and offered to settle with plaintiff at the rate of 1 rupee, 14 *annas* per *pakhee*. Plaintiff claims *wasilat* from Phagoon 1209 to 20th Bhadoon 1250, being 40 years and 6 months upon the above lands; making a total of Company's rupees 33,499, 2 *annas*, at 826 rupees per annum, with interest from plaint to date of realization, being at the rate of 1 rupee, 14 *annas* per *pakhee*. The principal sudder ameen has decreed at this rate against both the defendants (from 1231 to 1242) the sum of 9,912 rupees, 1 *anna*, with interest from date to realiza-

* Vide preceding Decision.

tion ; and from 1243 to the 19th *Maugh* 1250, against Gooroo Das and Ram Rungonee, the sum of 6,100 rupees, 11 *annas*, with interest as above, and costs rateably. Three petitions are now, as shewn, before the Court against this order.

“ No. 254 is the petition of the appellant—decreedar. She urges that the receipt of the 29th April 1826, for *wasilat* up to 1230, does not cover the *wasilat* due on the land now decreed, which land she states she has always asserted to be *without* the decree for the 4 *kismuts*, (Gobra, &c.) She further states she has already, on the 3d March 1846, obtained an order from the principal sudder ameen for *wasilat*, antecedent to 1230, on certain *dewuttur* lands (1,200 *biggahs*), decreed against the appellants ; and pleads that she is also entitled to *wasilat* in this case also previous to 1230 ; and closes with the plea, that if her *wukeel* in 1839, before the principal sudder ameen, admitted the receipt of all the *wasilat* up to 1230, due on the 4 *kismuts*, it can only be attributed to an error on his part.

“ Referring to the proceedings in the case for the 1,200 *biggahs*, I would dismiss this appeal. The 600 *biggahs*, the *wasilat* of which is now before the Court, were decreed to respondent by Mr. Dick in July 1840. Both parcels of land have been, by this Court’s decrees on the last mentioned date and in January 1844, declared to be within the four *kismuts* decreed by Messrs. Harington and Fombelle in 1814 to respondent’s ancestor ; and the receipt of April 1826 clearly includes *wasilat* upon both up to 1230. Indeed, till the *present* petition of appeal was filed, it was never pretended that the lands, on which *wasilat* is now claimed, are other than the lands forming part of the four *kismuts* decreed in 1814. I therefore come to the decision that appellant is entitled to recover *wasilat* from 1231 onwards, and would dismiss her appeal.

“ No. 248 is the petition of Gooroo Das Raee and Ram Rungonee, widow of Doorga Das Raee. It is pleaded that though this suit was instituted *before* the issue of circular order 11th January 1839, the case was pending in the courts after that period ; and a supplementary plaint, or paper of proper value, should have been filed by the plaintiff in order to justify a decree for *wasilat*. It must here be observed, that plaintiff did ask for *wasilat* as well as possession in the plaint, though the former claim was not covered by a proper stamp.

“ The lands in dispute are said to be within the 4 *kismuts* decreed as measured by the *ameens* ; and it is urged that the decree of this Court (1834), directed that the *jumma* to be collected upon them should not be in excess of that collected in former years, until process of law should be taken out for establishing a right to increased assessment. The petitioners conclude, claiming exemption from the award of *wasilat* previous to 1244, from which

period, under the order of the *foujdaree* court, they have held possession.

"No. 249 is the petition of Ram Ruttun Rae and others. It sets forth all that is urged in their petition in the cases Nos. 104 and 154, between the same parties, and assigns the same reasons for exemption from the award of *wasilat* passed against them from the years 1231 to 1242, conjointly with the other appellants. This order of the principal sudder ameen is at variance with his order in the case last adverted to, which awards *wasilat* to the decree holder, Rane Kuteanee, from the appellants, *jointly*, from 1209 to 1242.

"In deciding on the amount of *wasilat*, the period for which it is to be paid, and the party or parties responsible for the same in this case, the arguments of the parties to the appeals 104 and 154, and the documents they produce, must be considered. The lands in one case amount to 1,200 *biggahs* or thereabouts, in the other to about 600 *biggahs*. Both parcels are in the four *kismuts* (Gobra, &c.); and both cases are in every respect the same, and the decision of the Court in one must guide its decision in the other."

BY THE COURT.—It is needless to repeat the grounds on which the Court dismiss these three appeals; as the reasons, fully recorded in the Court's decision of this date in the other cases between these parties, are equally applicable to them. The Court, therefore, confirm the decision of the principal sudder ameen. Costs to be charged to the parties respectively.

THE 24TH JUNE 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,
JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE NO. 4 OF 1848.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, March 27th, 1846; reversing a decree passed by the Moonsiff of Gurhune, May 26th, 1845.

ISHWUR THAKUR AND OTHERS, APPELLANTS,
(DEFENDANTS),
versus

UGHUN THAKUR AND OTHERS, RESPONDENTS,
- (PLAINTIFFS.)

Wukeel of Appellants—Hamid Russool.

Wukeel of Respondents—J. G. Waller.

THIS case was admitted to special appeal, on the 7th September 1847, under the following certificate recorded by Mr. C. Tucker:—

‘ Whilst this case was pending before the moonsiff, the plaintiffs’ *wukeel*, with one of the plaintiffs then present, proposed that if certain of the defendants would swear on the *potee hurbuns*, that they had not been in possession of the property sued for up to 1251 F., they would withdraw their claim. The defendants agreed, and did swear; and the moonsiff dismissed the claim. An appeal was preferred by the plaintiffs, who were not personally in attendance before the moonsiff, on the grounds that they had not authorized their *wukeel* to make such a proposition, and that the act of their co-plaintiff did not bind them. The principal sudder ameen reversed the decision of the moonsiff on those grounds; and, further, because it was contrary to practice to take the oaths of parties after evidence had been adduced; and, further, that to swear the defendants on the *potee hurbuns* was illegal, and opposed to the provisions of Act 5, 1840.

‘ I admit a special appeal to try whether, in reversing the decision of the moonsiff, under the circumstances and for the reasons stated, the principal sudder ameen has not acted illegally.’

Under the circumstances set forth in the certificate, which are corroborated by reference to the record, we are clearly of opinion that the decision of the principal sudder ameen must be reversed, and that of the moonsiff affirmed, as the respondents cannot be permitted to depart from the terms of the agreement to which they gave their assent. We accordingly decree for the appellants, with costs, in all the courts, payable by the respondents.

THE 24TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 6 OF 1848.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Shahabad, March 27th, 1846; reversing a decree passed by the Moonsiff of Gurmune, May 26th, 1845.

ISHWUR THAKUR AND OTHERS, APPELLANTS,

(DEFENDANTS,)

versus

JUGROO THAKUR AND OTHERS, RESPONDENTS,

(PLAINTIFFS.)

THIS case was admitted to special appeal by Mr. Charles Tucker, on the same date, and for the same reasons as those set forth in the certificate given in the preceding case (No. 4); and the order passed is the same in both instances.

THE 24TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 5 OF 1848.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Shahabad, March 27th, 1846; reversing a decree passed by the Moonsiff of Gurhnee, May 26th, 1845.

ISHWUR THAKUR AND OTHERS, APPELLANTS,
(DEFENDANTS,)

versus

SYUD OULAD HOSEIN, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Hamid Russool.

Wukeel of Respondent—J. G. Waller.

THIS case was admitted to special appeal, on the 7th September 1847, under the following certificate recorded by Mr. C. Tucker:—

‘This case is connected with those already admitted under certificates given in Nos. 4 and 6 this day. Those cases were for the proprietary right: this is for rent of the same land, and should consequently be admitted, as it must follow the fate of the other two.’

The cases referred to in the above certificate have this day been disposed of, being Nos. 4 and 6 of 1848, and the appeals were decreed.

Consequently we decree this appeal also; annulling the decision of the principal sudder ameen, and affirming that of the moonsiff, with all costs payable by the respondent.

THE 24TH JUNE 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 358 OF 1847.

Special Appeal from a decision passed by the 2nd Principal Sudder Ameen of Zillah Jessore, August 21st, 1845; amending a decree passed by the Moonsiff of Mahomedpore, December 28th, 1844.

RAMDHUN NAG AND RAMTUNOO NAG, APPELLANTS,
(DEFENDANTS),
versus

RAMLOCHUN SIKDAR AND JOYKISHEN SIKDAR,
RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellants—Shibnurain Chatterjee.

Wukeel of Respondents—Kishen Kishore Ghose.

THIS case was admitted to special appeal, on the 15th June 1847, under the following certificate recorded by Mr. C. Tucker:—

‘The petitioners (appellants,) and Gour Mohun Chuckerbuttee, &c., were sued by the plaintiffs for possession of two plots of land,—one containing 2 *pakhees*, the other 2½ *pakhees*.

‘The petitioners pleaded that the plot containing 2 *pakhees* of land appertained to their *jote*; and as for the other plot, they knew nothing about it. Gour Mohun Chuckerbuttee, &c., the other defendants, viz. the *talookdars* of both plaintiffs and defendants, pleaded that the plot consisting of 2½ *pakhees* of land was their own private *khamar* land.

‘The moonsiff decreed possession of the plot containing 2 *pakhees* to the plaintiffs.

‘An appeal was preferred by both the plaintiffs and the petitioners. The principal sudder ameen reversed the decision of the moonsiff, and decreed the other plot consisting of 2½ *pakhees*, with *wasilat*, against the petitioners.

‘Special appeal granted on account of the *wasilat* decreed against the petitioners, for lands not in their possession; the *talookdars*, also defendants, acknowledging that they were in possession of the plot of land consisting of 2½ *pakhees*.’

After due consideration of the principal sudder ameen’s decision, which declares the appellants to be in possession, and hence con-

finds the order for payment of *wasilat* to them to the exclusion of the other defendants in the original suit, we see no reason to interfere with his order ; and therefore dismiss the appeal with costs.

THE 24TH JUNE 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 271 of 1844.

*Regular Appeal from a decision passed by Syud Ahmud Buksh,
Principal Sudder Ameen of Zillah Nuddea.*

MR. JAMES HILL AND MR. ALFRED ORME, APPELLANTS,
(DEFENDANTS,)

versus

BAMUNDAS MOOKERJEE, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Pursun Komar Tagore.

Wukeel of Respondent—Kishen Kishore Ghose.

SUIT laid at Company's rupees 24,684-5-7, price of 40 *maunds* of indigo due for the years 1840-41-42, severally, with interest thereon.

Respondent instituted the suit to recover the sum claimed, on the allegation that appellants were bound by a deed of engagement, entered into by their predecessors in the indigo concerns now held by them, to deliver to him, annually, 40 *maunds* of indigo, or value thereof at the average selling rate of best indigo of the year, in consideration of his giving up to them a certain factory of his with its cultivation, and paying to them the sum, yearly, of 2,500 Company's rupees for expenses of carrying it on.

The appellants denied liability. The appellant, Mr. James Hill, however admitted that the signature on the deed was like his writing.

Respondent adduced proof that the signature was Mr. James Hill's ; and that appellant, Mr. Alfred Orme, had deducted from rent he had to pay the respondent for an *ijara*, or farm, the sum of 2,500 rupees payable by respondent on the above agreement. It was in proof besides, that appellants had compromised two appeals pending in the Sudder Court for similar demands of respondent, grounded on the very deed now in question, on account of former years ! The principal sudder ameen therefore decreed the full claim ; the average selling rate of best indigo of the several seasons having been duly proved, on certificates and depositions of indigo brokers.

The appeal rested on the same grounds as the defence.

The *rukanameh*, or compromise, submitted to by appellants in the two appeals abovementioned, evinces beyond doubt that appellants paid to respondent, on account of the very deed on which the present claim is founded, the sum of 17,000 rupees; consequently, their present denial of the deed, and liability under it, is utterly unaccountable! The value of the indigo due to respondent, as set forth in the plaint, has been fully ascertained by the certificates and depositions of brokers. Therefore appeal dismissed with full costs.

THE 26TH JUNE 1848.

PRESENT:

R. H. RATTRAY and

A. DICK, ESQRS.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 17 of 1848.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, Munowur Ali Khan, August 13th, 1847.

PURSUN RAM AND OTHERS, APPELLANTS, (PLAINTIFFS,)

versus

MOHUMMUD TUKEE KHAN AND MUSST. SYUD-O-NISSA, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellants—E. Colebrooke, Abbas Ali and Ameer Ali.

Wukeel of Respondents—Hamid Russool.

THIS suit was instituted by appellants, on the 25th January 1847, to cancel a *hibahnameh*, or deed of gift, executed by Mohummud Tukee Khan in favor of his wife, Musst. Syud-o-nissa, on the 24th April 1844, corresponding with the 21st *Bysakh* 1251 *Fuslee*; the said *hibahnameh* interfering with the just payment of certain decrees of court held by appellants, for which the respondent, Mohummud Tukee Khan, is liable. Estimate of claim Company's rupces 9,921, 6 annas, 7 pie.

The suit was dismissed by the principal sudder ameen, on the grounds of the *hibahnameh* having been really executed, and possession of the lands given and received of a village called Kawath. Regulation 2 of 1806, and the circular of the 10th June 1842, are cited as authorising the transfer between the respondents.

The judge who brought the appeal before a full bench (Mr. Rattray) recorded the following as his reasons for so doing:—

‘ The decrees held by appellants were passed : one in 1831, one in 1837, and two in 1840,—the latest above 3 years before the lands were transferred.

‘ On the 12th May 1843, orders were passed in the principal sudder ameen’s court for an application to be made to the commissioner of revenue, for his sanction to the collector to sell these lands, in satisfaction of a decree of appellants, amounting to rupees 1,764 : this, on a petition praying for the sale, presented by the appellants.

‘ On the same date, three other orders were passed in the same court, to the same purport, having reference to three other separate and distinct decrees held by appellants. These four decrees are those upon which the present action is founded.

‘ On the 8th January 1844, a decision of this Court cancelled a sale, or pretended sale, by which creditors had been defrauded ; and this precedent, amongst others, is considered a good index to the course which should be pursued in the present instance.

‘ The possession of Musst. Syud-o-nissa, consequent upon the execution of the *hibahnameh*, is denied by appellants, and disproved by their witnesses ; and, altogether, there is no doubt that the transaction between the husband and wife was a collusive fraud, to cheat the appellants out of their legal dues under the decrees held by them.’

We observe that the provisions of Regulation 2, 1806, cited by respondents and alluded to in the principal sudder ameen’s decision, as well as the circular order referred to, relate to alienations of property *pendente lite*, and are to the effect, that such alienations are valid unless process of attachment, under Regulation 2, 1806, has issued in the usual form. But, in this case, the alienation of the property took place after appellants had obtained a money decree against the respondent, Mohummud Tukee, and had actually applied for attachment and sale of the lands, and they had been lotted and proclaimed for public sale. Further, the circumstances of the transaction clearly shew that the transfer was not *bond fide*, but with a view to save the property from being appropriated to the satisfaction of the decrees, and thus to defraud the decreeholders. We consider the transfer, therefore, to be altogether illegal and void ; and, reversing the decision of the principal sudder ameen, declare the property available in satisfaction of the claims of appellants.

THE 26TH JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

CASE No. 333 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Dinagapore, Mohummud Khoorshed Khan.

RADHA RUMUN SUNDEEAL, GUARDIAN OF KISHOON
BULUB RAE, (MINOR,) ADOPTED SON OF GOCOL
CHUNDUR RAE, APPELLANT, (PLAINTIFF,)

versus

HURLAL THAKUR, AFTER HIS DECEASE, BHOOBUN MO-
HUN THAKUR, FOR SELF AND AS GUARDIAN OF TYLOKE
MOHUN THAKUR, MINOR, SON AND HEIR, RESPONDENT,
(DEFENDANT.)

Wukeel of Appellant—J. G. Waller.

Wukeels of Respondent—Gholam Sufdur and Nilmoney Banerjee.

SUIT and appeal laid at Company's rupees 6,696-0-4, amount of principal and interest, and law costs incurred on account of defendant.

The statement of plaintiff (appellant) in the zillah and in appeal is, that being agent for defendant (respondent), he borrowed and paid into the collectorate, for revenue due on respondent's estate, the principal of the above sum (Company's rupees 4,394), as desired by respondent. That the lender of the money sued him and respondent for the sum lent, with interest, and eventually in appeal got a decree for it against him only, with costs: hence this suit.

The defendant (respondent) has throughout denied he ever authorised the loan; and, in bar of the present suit, cites the decision of the Sudder Court releasing him from liability, and rendering the appellant alone answerable for payment of the loan in question.

The appellant has filed in proof of his claim, two letters written to him by respondent, Hurlal, desiring him to pay up the revenue; and a petition filed by him in the collectorate, at the time of paying up the arrears of revenue, in which he intimated that he had borrowed the sum in suit to enable him to pay the arrears. From the contents of the two letters, it is apparent that appellant had charge of the collection of rents from the estates for which the revenue was due, and that he was merely desired to pay up the revenue and remit a sum of 1,000 rupees more to respondent; not a word about incurring any debt to pay up the arrears. The

petition is no proof of liability on the part of respondent. There is therefore no proof before the Court, that renders the respondent responsible for the loan. If appellant truly paid the arrears out of the loan and in consequence of possessing no assets belonging to respondent from collections from the estates, or otherwise, he may recover it on a suit for settlement of accounts between him and his principal. His present claim has, however, been very properly dismissed. Decision of the lower court affirmed, and appeal rejected with full costs against appellant.

THE 27TH JUNE 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 779 OF 1847.

IN the matter of the petition of Gholam Nubbee, filed in this Court on the 27th December 1847, praying for the admission of a special appeal from the decision of Syud Ushruf Hossein, principal sudder ameen of Tirhoot, under date the 16th September 1847 ; affirming that of the moonsiff of Mohoa, under date the 16th December 1846, in the case of the petitioner, plaintiff, *versus* Goondur Koonwur and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff sued to establish his right and possession to a moiety of *mouzah* Tyabpore, purchased by him on 12th December 1842, at a sale made in execution of a decree obtained by one Jea Khanum, against Ishore Dutt, on the 23d November 1840,—the rights and interests of the defendants in the above village forming the subject of sale.

The defendants pleaded a purchase from Ishore Dutt of 7½ *annas'* share of the village, made before the auction sale.

The moonsiff and principal sudder ameen dismissed the plaint ; and the plaintiff now applies for permission to file a special appeal in this Court.

The moonsiff in his decree, confirmed by the principal sudder ameen, has used a multitude of strong expressions to shew that the plaintiff's claim is groundless ; but neither of those officers has touched the real merits of the case.

The plaintiff purchased at a public sale : the defendants plead a private sale of prior date made by the debtor. The question at issue clearly was, whether the purchase pleaded by the defendants was *bonâ fide*, or fraudulent for the purpose of defeating the rights of the public purchaser. This point the moonsiff and principal sudder ameen have not touched. They have decided the case

without calling for the original deed of sale given by the debtor to the defendants,—they have not examined the subscribing witnesses to it, or any witnesses to the fact of defendants' possession; and, in fact, have not taken the slightest pains to get at the real merits of it: whereas the very fact of a private sale, under the circumstances, of $7\frac{1}{2}$ annas out of 8 annas was, of itself, enough to call for the strictest enquiry. They have proceeded for the most part upon copies of certain summary and miscellaneous proceedings; and, in so doing, have exhibited not a little ignorance of their duties.

In addition to this the plaintiff sued for an 8 annas' share of the village; the defendants claimed $7\frac{1}{2}$ annas' share; and yet the entire claim of the plaintiff has been dismissed.

The decision of the lower courts I consider, for the foregoing reasons, to be altogether imperfect and incomplete; and, admitting the appeal, remand the case to the moonsiff for further and full enquiry.

THE 28TH JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 264 OF 1847.

Regular Appeal from a decision passed by Syud Abdool Wahid Khan, Principal Sudder Ameen of Moorshedabad, March 27th, 1847.

NUWAB SYUD ASADOOLLA KHAN, APPELLANT,
(DEFENDANT,)

versus

SUMERCHUND DUKA MUHAJUN, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Gholam Sufdur.

Respondent absent in Appeal.

CLAIM rupees 10,491, on a bond dated 14th Jeyt 1240 for rupees 30,000.

This is a claim on a simple bond for 30,000 rupees, executed in favor of the plaintiff, and bearing the seal of the defendant, and also the signature of the agent to the Governor General, which appears to have been attached to the bond because the defendant was a minor at the time the money was borrowed.

The defendant pleaded the invalidity of the bond, in consequence of his minority at the time it was executed.

On the 27th March 1847, the principal sudder ameen gave an award in favor of plaintiff, considering that as money had been paid, in liquidation of the claim, from the funds of the defendant after he attained majority, he must be considered to have admitted the claim to be good ; and, further, that the agent having borrowed the money *bond fide* for the use of the defendant, during his minority, the claim was good of itself.

From this decision the defendant appeals. The respondent has not appeared.

The agent must be looked on as the guardian of the defendant at the time the money was borrowed. There is no doubt that the defendant absolutely received the money, and applied it to his use ; that he allowed his salary to be applied to liquidation of the debt after attaining majority, without making any objections. We therefore consider the bond binding on the defendant, and the award against him is correct. The defendant, however, objects to the manner in which the account is drawn out. He desires that the total sum lent, with interest up to the close of account, be allowed on one side ; and, on the other, the sums paid in liquidation, and interest on each from the date of payment to the same date. As the bond contains no stipulation of periods for the payment of interest, we consider that the principle on which the appellant desires to have the calculation made is correct, and direct that the decision of the lower court be so far modified. Costs of appeal, on the portion of the award upheld, to be paid by the appellant, and the rest by the respondent.

THE 28TH JUNE 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 790 of 1846.

IN the matter of the petition of Bydenath Opadeeah, filed in this Court on the 23d April 1846, praying for the admission of a special appeal from the decision of Mynooddeen Sufdur, additional principal sudder ameen of the 24-Pergunnahs, under date the 18th July 1846 ; affirming that of Mr. John Weston, sudder moonsiff of the said zillah, under date 28th February 1846, in the case of Neelkumul Bose, plaintiff, *versus* petitioner and Neelmonee Mistree, defendants.

The plaintiff's house had on the north side a wall 12 feet high, with a set off at the foundation of 2 inches. The petitioner's house is situated directly north of this wall, and he erected a wall 13½

feet high, commencing on his own land; but, after passing the set off in the plaintiff's wall, gradually lessening the vacuum between the two walls, which he filled up with rubbish till it reached the cornice of the plaintiff's wall, which the defendant partly removed to enable him to carry on his own wall, which he united with that of the plaintiff's, at the summit, to prevent the rain descending between the two, and injuring both. Inasmuch as the defendant's wall impends over the set off of the plaintiff's wall, the part which so impends may be said to encroach on the plaintiff's ground; and, in this view, the latter instituted this suit to compel the defendant to remove his wall.

The lower courts took evidence merely as to the facts, which being, as above stated, the plaintiff got decrees in both.

The petitioner founds his application for a special appeal on the custom in this country of erecting houses, and pleads that the trespass, if any, is justifiable, and warranted by custom and common sense; inasmuch as had he not united the walls at the top, and left a vacuum, the rain would assuredly have destroyed both walls, and then the plaintiff would have his action against him for not closing up the vacuum when he built the wall.

Before an equitable decision can be come to, more is required than evidence to the facts, which, indeed, are not disputed by the defendant. I therefore admit the special appeal; and remand the proceedings to the moonsiff's court, who will afford the defendant an opportunity to put in evidence as to the custom which prevails in erecting walls under the circumstances set forth.

THE 28TH JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES. .

CASE No. 294 OF 1844.

*Regular Appeal from a decision passed by the Additional Principal
Sudder Ameen of Hooghly, April 24th, 1843.*

TIRPOORA SOONDREE, KISHENPURSHAD SEIN AND
OTHERS, APPELLANTS, (DEFENDANTS,)

versus

JYECHUNDUR PAL CHOWDHREE, RESPONDENT,
(PLAINTIFF.)

*Wukeels of Appellants—Gholam Sufdur and Neelmoney
Banerjee.*

Wukeel of Respondent—J. G. Waller.

SUIT laid at Company's rupees 9,972. Appeal laid at 4,956-8.

This suit was instituted by the zemindar of *mouzahs* Baldebpore, Bazeedpore, Buhadurpore and others, with a view to obtain a judgment of court, declaring that certain lands in the above three villages in the possession of the defendants, and held by them as *lakhiraj*, are *mdl* lands,—that is included in the assets of his decennially assessed estate.

The petition of plaint set forth that the estate was purchased at a revenue public sale, in the year 1206 B. S., by one Neelmunee Holdar; and that, after various sales and transfers, it came into the possession of the plaintiff. That Neelmunee Holdar having ascertained that Anundeeram Sein, the grand-father, and Ram Soonder Sein, the father of the defendants, had fraudulently appropriated to themselves, as *lakhiraj*, a quantity of lands in the above three villages, sued them in the zillah court of Hooghly to recover the same, amounting to 125 *biggahs*, and five tanks. That he obtained a decree in the zillah court on 11th August 1800; but that, on appeal to the provincial court, the matter was compromised,—the zemindar relinquishing to the *lakhirajdars* 81 *biggahs*, 9 *cottahs*, and a tank, named *Chumpapokur*, and the *lakhirajdars* giving up the rest of the lands sued for to the zemindar. That, notwithstanding this, Ram Soonder Sein, in the year 1209, fraudulently filed in the collector's office a *taeedad* for 150 *biggahs*, 17 *cottahs* of land. That a resumption suit was subsequently commenced by the revenue authorities, with a view to declare these lands liable to the payment of revenue, which was decided by the deputy collector in favor of Government on the 21st August 1837. That the *lakhirajdars* appealed to the special commissioner; that the case is still pending; that the plaintiff had appeared and objected to the assessment, the lands being included in his zemindaree assets. That the defendants have possession of 351 *biggahs* 18 *cottahs*, from which deducting 81 *biggahs*, 9 *cottahs* (the quantity forming the subject compromise between the former zemindar and the *lakirajdars*), he sues to declare the remaining 270 *biggahs*, 9 *cottahs* as assets of his zemindaree.

The defendants answered, that, out of the lands included within the boundaries specified in the petition of plaint, there were not more than 162 *biggahs*, 4½ *cottahs* in their possession as follows:—

	<i>Biggahs.</i>	<i>Cottahs.</i>
Lands resumed by Government,.....	66	6
A <i>lakhiraj</i> tank in one village,.....	3	10
<i>Lakhiraj</i> lands and tank in another village,...	38	13½
Land in <i>mouzah</i> Aligurhee, without the plain- tiff's estate,.....	6	0
<i>Istemraree</i> lands,.....	47	15
Total,	162	4½;

and that the rest of the lands were in the possession of other parties, unconnected with the defendants. Their right to the lands they declared themselves ready to prove, by documentary and other evidence.

The principal sudder ameen took evidence from both parties, and then deputed an *ameen* to measure the lands, and to make local enquiries. The measurement shewed the quantity, contained in most of the parcels, to be somewhat in excess of that mentioned by the defendants. The extent of the lands measured, as far as they are connected with the present case, appeared to be 281 *biggahs*, 15 *cottahs*, 10 $\frac{3}{4}$ *chittacks*; some of which the *ameen* reported to be in the possession of the defendants, and some in the possession of other parties. The particulars of these 281 *biggahs*, 15 *cottahs*, 10 $\frac{3}{4}$ *chittacks* are given below in the detail of the principal sudder ameen's decree.

The principal sudder ameen gave judgment on the 24th April 1843. He divides the lands into 12 portions, as follows:—

1. Resumed lands,	83	19	2 $\frac{1}{2}$	0
2. <i>Istemraree</i> ,	64	7	13	3
3. <i>Mal khamar</i> , or zemindaree private } lands,	31	1	10	0
4. <i>Thakoor</i> and <i>tola</i> tanks,	34	17	0	0
5. Purchased <i>lakhiraj</i> land,	9	16	0	0
6. <i>Peer</i> tank,	4	7	0	3
7. <i>Dewutter</i> and <i>birmutter</i> lands,	36	16	3	10
8. <i>Chumpa</i> tank,	1	5	10	0
9. Waste land,	1	10	0	0
10. <i>Dewutter</i> land (2d portion,)	1	3	5	0
11. <i>Chakeran</i> land (or called,)	2	7	0	0
12. Lands exclusive of the above, said to be } in the possession of others,	9	16	2	10;

and then proceeds to determine upon each portion separately, as below.

No. 1. *Resumed lands*, 83 19 2 $\frac{1}{2}$

The lands under this head having been resumed by Government, must be struck out of the plaintiff's claim, which, in regard to this portion of it, must be dismissed.

No. 2. *Istemraree lands*, 64 7 13 3

The principal sudder ameen observes that *istemraree* lands are *mâl* lands, as rent is paid upon them; and as the plaintiff sues to have this fact declared, he must have a decree upon this portion of the claim. At the same time he remarks, that as on one occasion a notice was served upon the plaintiff to receive the rents of these lands, the suit, as far as it refers to them, was wholly unnecessary, and only calculated to harass the defendants. He pronounces no opinion upon the *validity* of the tenure; but, hold-

ing it to be shewn as a fact that the lands are *mál*, he decrees for the plaintiff, but charges the costs on this part of the claim to him.

No. 3. *Mál khamar lands*, 31 1 10

The defendants admit these lands to be *mál*, but say they are not in their possession. The principal sudder ameen is of opinion that the claims advanced by certain other parties, five years after the commencement of this litigation, have been brought forward in collusion with the defendants, who are shewn to be themselves in possession of them.

No. 4. *Thakoor and Tola tanks.*

	<i>Biggahs.</i>	<i>Cottahs.</i>
<i>Thakoor tank</i> ,	5	0
<i>Tola tank</i> ,	29	17
	34	17

The principal sudder ameen enters into a full examination of the evidence adduced in support of the *lakhiraj* tenure of this property: for reasons stated, he rejects the evidence, and declares the tanks to be the property of the zemindar.

No. 5. *Purchased lakhiraj lands* 9 *biggahs*, 16 *cottahs*.

The 6 *biggahs* alleged to be in the village of Aligurhee are included in this portion. A number of deeds of sale, and other documents, were filed in proof of the defendants' right to these lands. The principal sudder ameen, for reasons stated by him, rejects them all; and considering it proved that these lands are *mál*, within the zemindaree of the plaintiff, and wrongfully held as *lakhiraj* by the defendants, decrees in favor of the plaintiff.

No. 6. *Peer tank* 4 *biggahs*, 7 *cottahs*, 3 *chittacks*.

The principal sudder ameen rejects the evidence in proof of the *lakhiraj* tenure of this tank, and considers it to be a part of the assets of the plaintiff's estate.

No. 7. *Dewutter and Birmutter lands*, 36 16 3 10

Claims to some portions of these lands have been set up by other parties. The principal sudder ameen declares them to be all collusive; and pronounces the lands to be *mál*, and in possession of the defendants.

No. 8. *Chumpa tank*, 1 5 10

This tank forms the subject of another suit between the parties, and has consequently been struck out of this case.

No. 9. *Waste land*, 1 10 0 0

No. 10. *Dewutter land*, 1 3 5 0

No. 11. *Chakeran land*, 2 7 0 0

No. 12. *Lands in possession of others*, 9 16 2 10

The principal sudder ameen holds that the lands under the above four heads are in the possession of the defendants; but that they form a portion of the assets of the plaintiff's estate.

The result of the principal sudder ameen's decision is, that deducting the lands under heads 1 and 8 (amounting in all to 85 *biggahs*, 2 *chittacks*, 5 *gundahs*) a decree is passed declaring the remaining 196 *biggahs*, 9 *cottahs*, 2 *pows* to be *mdl* assets of the plaintiff's estate.

The defendants appeal from this decision in regard to Nos. 3, 4, 5, 6, 7, 9, 10, 11, and 12. They of course do not object to the decree as it affects No. 2. The case was first argued with reference to the question of a nonsuit, on the ground of incorrectness in the plaint: *first*, because the plaintiff had sued for lands resumed by Government; *secondly*, because he had sued for *istemraree* lands, calling them and valuing them as *lakhiraj* lands; and, *thirdly*, because he had sued for lands, some of which were not within the plaintiff's estate, and some were not in the possession of the defendants.

In regard to the first point, the plaintiff has excepted from this suit the 81 *biggahs*, 9 *cottahs* forming the subject of compromise, in the suit decided by the judge of zillah Hooghly on the 11th August 1800; and sues for the rest of the land in the possession of the defendants. The deputy collector and special commissioner decreed for the resumption of 149 *biggahs*, 5 *cottahs*, including the 81 *biggahs*, 9 *cottahs* above-mentioned. The defendants say, that out of the lands now sued for, 66 *biggahs*, 6 *cottahs* have been resumed. This quantity, added to the 81 *biggahs*, 9 *cottahs* excepted, will give 147 *biggahs*, 15 *cottahs*, being a very near approach to the quantity resumed. At the time this suit was instituted, the deputy collector had decreed for the resumption; but the case was yet pending in appeal before the special commissioner, and was decided two months after the institution of this action. The plaintiff had appeared in the court of the special commissioner, and had there claimed the lands as his property; but was finally unsuccessful. We are therefore of opinion, that there is nothing in this part of the case to call for a nonsuit. The ordinary courts of justice cannot call in question the judgments of the special commissioner; and, consequently, the plaintiff's claim, for land resumed by a decree of that functionary, would be altogether inadmissible. In such case dismissal, and not nonsuit, would be the proper order.

In regard to the *istemraree* lands, there is nothing on the record to shew that the plaintiff ever acknowledged them to be such, or ever received rent for them. All that he could be called upon to acknowledge, were the facts that the defendants held possession of them, that he had received no rents for them, and that they were his (the plaintiff's) property; and he framed his plaint accordingly. It was, moreover, impossible for him to foresee the line of defence that would be taken by the defendants.

As to the valuation, there has been no under-valuation of the property : if there has been excess in this respect, the penalty will fall on the plaintiff. Looking at the terms of the plaint, however, and the circumstances of the case, we can see no ground for a nonsuit upon this point.

The third point involves only questions of fact and evidence. If the defendants can prove their allegations that the lands are in the possession of others, or are situated beyond the boundaries of the plaintiff's estate, this part of the claim will be dismissed, *quoad* the present defendants.

It is, moreover, decisive against an order of nonsuit in this case, that the defendants have themselves abandoned it. The petition of appeal says nothing upon the subject : it has been urged orally by the pleaders of the appellants. The original suit was valued at 9,972 rupees, the appeal at 4,956. Had the appellants intended to apply for a nonsuit, they must have appealed upon the full valuation specified in the plaint ; their not having done so, shews that they seek only a decision upon the merits in regard to such parts of the property in dispute as have been awarded to the plaintiff.

It is urged, however, that the Court can of itself take up such a question, though it has not been pleaded by the appellant. This may be true in regard to a plaint, on which, from its incorrectness, no decree can possibly be given : but such is not the case here ; and the Court are not required to do for the appellant what he has omitted to do for himself. There has been no appeal on the question of valuation ; and therefore, with reference to the rule of paragraph 3, of the Circular Order No. 161, volume III., dated 2d August 1841, there can be no trial of that point by this Court. Some stress has been laid by the appellant's pleaders upon Construction No. 997, which, we are of opinion, has nothing whatever to do with the case. The Construction cited refers to parties not before the Court, and bears no reference whatever to the competency or otherwise of the Court to take notice, in favor of the appellant, of a question like that under consideration, which has evidently been abandoned by himself.

We are therefore of opinion, that there are no grounds for a nonsuit. • .

In regard to the merits of the case, we concur with the principal sudder ameen in the decision he has passed in regard to the portion Nos. 1 and 8.

With reference to No. 2, or the *istemraree* lands, we do not see any reason for concluding that this part of the claim was brought forward by the plaintiff with a view to harass the defendants. The plaintiff, however, has not appealed against this part of the principal sudder ameen's decree, nor has he filed any reply to the

petition of appeal, so as to enable the court to adjudicate under Construction No. 868 upon the case, in any other form than as it is set forth in the petition of appeal. The principal sudder ameen has found *as a fact*, that these lands are held by the defendants under an alleged *istemraree* tenure; and there this part of the case must be left. This, however, still leaves open the question of the zemindar's right to resume and re-assess these lands.

Before disposing of the rest of the case, it is necessary again to advert to the suit between the former zemindar and the *lakhirajdars*. That suit was for 125 *biggahs* and 5 tanks; and it is asserted, that the present action is for lands altogether distinct from those which formed the subject of litigation in 1800. From a perusal, however, of the petition of plaint and answer in that case, as well as of the deeds of compromise executed by both parties, we can come to no other conclusion than that that suit comprised all the lands held, or claimed, by the *lakhirajdars* in the villages of Basdebpore, Bazeedpore, and Buhadurpore; and the assertion that the lands now sued for are distinct from those, we consider to be without foundation.

The zillah judge gave a decree in full for the zemindar, recording it as his opinion that the whole of the documents produced by the defendants, in proof of the *lakhiraj* tenure, had been fraudulently obtained by the *lakhirajdars* during the period (a lengthened one about 25 or 30 years), in which they had held a farm of the estate. The decree of the zillah court was modified by the provincial court upon the terms of the compromise between the parties.

We concur with the principal sudder ameen in considering it established, that the lands comprised in portions 3, 4, 5, 6, 7, 9, 10, 11, and 12 are in the possession of the defendants; that they are all situated within the plaintiff's estate, and that they form part of its assets. As to the claim of possession by other parties, we observe that the same plea in regard to some portions of the lands sued for was set up in the former suit, notwithstanding which the defendants subsequently entered into an adjustment for the whole. With reference to the documentary evidence now brought forward in support of the *lakhiraj* grants, Mr. Jackson considers them to be insufficient to establish the claim set up by the defendants; while Mr. Hawkins would reject them altogether, as documents which are not genuine. As for the deeds of sale, and such like documents, they are quite insufficient to rebut the plaintiff's claim.

We therefore see no reason for disturbing the judgment of the principal sudder ameen, which is accordingly affirmed. The costs of the appeal will be charged to the appellant.

MR. DICK.—Appeal laid at Company's rupees 4,955, 8 *annas* on account of 196 *biggahs*, 9½ *cottahs* of land, decreed to respondent as part of his revenue estate, or *māl* land, out of a claim for 270 *biggahs*, 9 *cottahs*.

The appeal was preferred and argued :—*first*, on the ground that the suit should have been nonsuited, because respondent had wilfully claimed lands resumed by Government, and lands not in their (appellants') possession, and claimed as rent-free lands which appellants held under an *istemraree* tenure. *Second*, that the principal sudder ameen had decreed lands in the possession of others, in a suit against appellants only, disclaimed by them, and without any proof as to the falsity of their disclaimer, and notwithstanding objections of the owners with proofs, and saddled appellants with costs. *Third*, that the principal sudder ameen has rejected, on insufficient and erroneous reasoning, the documentary evidence adduced by them appellants for the lands in their possession.

On referring to the answer of defendants, appellants, I find they therein duly claimed a nonsuit on the grounds above stated ; and I am clearly of opinion, that the grounds are valid for a nonsuit, and fully recognized in our Regulations, as tending to alter the legal cognizance of the case, and to induce oppression. The Clauses of Section 7, Regulation XXVI., 1814, make express allusion to a fraudulent motive, and a design to evade the provisions of the Regulations, which such wilful conduct in the plaintiff, in this case, doubtlessly involves. The allegation of the defendants should therefore have been first investigated ; and, being proved true, a nonsuit should have been adjudged. In my opinion, the respondent should now be nonsuited, with full costs of both courts.

As, however, my colleagues have dissented from my reference for nonsuit, I have examined fully the evidence adduced by appellants for the lands they admit to be in their possession ; and I can discover no sound reason for rejecting them. Most of the documents bear date long antecedent to the decennial settlement : and continued possession under them, and in some instances repeated transfers and alienations of the lands, are undisputed. On the contrary, the objections to them are apparently conjectural, or clearly invalid. I would, therefore, reverse the judgment of the lower court, with full costs against respondent.

THE 28TH JUNE 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqs.,

TEMPORARY JUDGES.

CASE No. 62 OF 1843.

*Special Appeal from a decree passed by G. C. Cheap, Esquire,
Acting Judge of Zillah Hooghly.*

CHYTUN CHURN SEIN AND KISHOON PURSHAD SEIN,
APPELLANTS, (DEFENDANTS,)

versus

GOVIND CHUNDUR BANERJEE, JYCHUNDUR PAUL
CHOWDHREE, AND RAM KISHOON RAE, RESPON-
DENTS, (PLAINTIFFS.)

Wukeel of Appellants—Gholam Sufdur.

Wukeel of Respondents—Gour Huree Banerjee.

APPEAL laid at 298 Company's rupees, 2 annas for possession of a tank called Chumpa, held illegally rent-free.

The plaint in this case rested on the right of a *malgoozar*-proprietor to resume the tank in question, held as rent-free by appellants under an invalid tenure.

The defence rested on a decree of court, by which the right of the appellants to rent-free possession of the tank was secured.

The decree was set aside, because founded on a compromise believed to have been collusive; and the claim was decreed.

The special appeal was admitted by Messrs. Tucker and Reid in 1843, on the following grounds:—

First, that apparently the *sunnud* was obtained for the 7 *biggahs* in 1193 B. Æ.

Second, petitioners' (appellants') ancestor obtained a decree by compromise, by which the zemindar gave up his claim.

Third, they and their ancestors have had alleged possession for a lengthened period, and the suit is for a small portion of rent-free land; therefore the fact of possession should be investigated; and if the existence of the tenure before the decennial settlement, and possession as rent-free beyond 12 years be established, the rent-free tenure and possession are both to be upheld.

The tank in question is expressly mentioned in the compromise, (on which the decision of the court was founded) above alluded to; and the tank was given up by the former zemindar as rent-free.

No suit therefore to resume it can be admissible, so long as that decision is in force. The decision of the lower court appealed from is reversed; and full costs of all courts awarded against respondents.

THE 29TH JUNE 1848.

PRESENT:

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 265 OF 1846.

*Regular Appeal from a decision passed by Captain H. M. Durand,
Commissioner of the Tenasserim Provinces, August 3d, 1846.*

J. BONDVILLE, APPELLANT,

versus

CAMILLO DIAS, RESPONDENT.

THIS is a suit originally made on a bond executed by C. Dias in favor of J. Bondville, for the supply of certain timber. The proceedings have been very irregular. The first decision is by Major McLeod, principal assistant to the commissioner of Tenasserim. There is no plaint or answer; but a proceeding in English signed by Major McLeod, in which he records that the parties abovementioned appeared before him in court, and asked him to decide a dispute between them regarding a contract for supply of timber. There is no arbitration bond, nor is the signature of the parties attached to the proceeding: it is simply a paper under Major McLeod's signature, to the effect that both parties agreed that his decision should be binding on them as in civil cases. This record goes on to award a penalty of 9,000 rupees against C. Dias, for breach of contract.

This order was reversed by the commissioner on appeal.

'The court has gone at great length into this case, in consequence of the peculiar character of the grounds of appeal, the explanatory statement, and the nature of the appellant's acquaintance with the English language.

'The *first* ground of appeal contains in fact two objections to the decision of the lower court: one based on the irregularity of the proceedings; and the other that the decision given was obtained in consequence of a fraudulent representation by Mr. Lenaine.

'The *second* and *third* grounds of appeal are in fact comprised, severally, by the two foregoing objections.

'The parties appear, at the suggestion of Mr. Lenaine, to have selected Major McLeod to arbitrate as to the meaning of the bond; and were proceeding to that officer's house, when they met his carriage, and he directed them, if they sought his opinion, to come to him when on the bench.

‘ It then occurred to Mr. Lenaine to apply to Mr. Bondville for a power of attorney; and the parties went to the lower court when Mr. Lenaine had thus provided himself.

‘ By the record of the proceedings of the lower court, it appears that both parties agreed to submit the dispute as to the terms of the bond for the opinion of the court, praying the court to pass its decision summarily on it; and that both parties agreed that the decision so given should be considered binding on them as in all civil cases. Upon this, the bond was presented, the decision of the court passed.

‘ In a case involving so large an amount, the lower court should either have entered the case as a regular suit; or, if it allowed itself to be chosen to arbitrate as umpire by the parties, the lower court should have caused an arbitration bond to be drawn out, explained to both parties, and signed by them, before it gave its decision. As it is the lower court has given a decision, and acted judicially upon such, in a case where no plaint was made, and where, according to the lower court’s own record, its opinion alone was sought.

‘ The court views the proceedings of the lower court as wholly irregular.

‘ With reference to the conduct of Mr. Lenaine, and the impression on Mr. Dias’ mind that he was proceeding to ask Major McLeod’s opinion, and not a judicial decree, the following circumstances must be noted.

‘ It is clear to the court from the manner of the appellant before this court, his very imperfect replies to its questions, and their inapplicability, that Mr. Dias does not understand English well. It is also clear from the evidence before the court, from the notes and writings filed on the proceedings, that, though Mr. C. Dias can write English, he does so most imperfectly; and has, according to Mr. Phillips’ evidence, frequent recourse to the assistance of other people to write for him, attaching his signature to what they write. Amongst the notes put before the court by Mr. Phillips was one wholly written, and signed C. Dias, by the respondent, Mr. Bondville, in Mr. Dias’ name.

From Mr. Phillips’ and Mr. Agar’s evidence, it is also clear that in matters of importance, such as a bond, Mr. Dias had such read out to him by Mr. Phillips and Mr. Agar; evincing thereby an undoubtable mistrust in his own knowledge of written English. Mr. Theodore stated that he and Mr. C. Dias read a note together, but it was not clear that Mr. C. Dias read it alone; and respondent failed to prove that the appellant had ever been heard, or seen to read out English, written or printed. He also failed, although a subpoena *duces tecum* was, at the respondent’s request, served on the appellant, and the respondent sent Mr. Lenaine to shew where such were to be found, and to see that nothing was

kept back, to prove that the appellant kept English account books. The court, after examining all the papers brought, found a very ill-written short memorandum of accounts, and a still worse written memorandum of an agreement entered into with Captain Guthrie, both acknowledged by the appellant as his own writing, and both most imperfect, and satisfactory proof to the court of the appellant's very imperfect knowledge of writing English. The conclusion which the court draws is, that Mr. Dias is but very partially conversant with the reading and writing of English, though not quite so incompetent as the appellant would have led the court to suppose.

'The pleader for the respondent was at first Mr. Lenaine; and, in replying to the appellant's statement, he clearly stated that upon Mr. C. Dias' refusing to proceed to some merchants, in order that the dispute as to the terms of the agreement might be settled, he proposed going to Major McLeod and asking him to decide. From the manner the parties at first went, it is clear that the first intention was only to obtain his opinion, and not a judicial decree; and when provided with a power of attorney by Mr. Bondville, Mr. Lenaine addressed the lower court: he asked, according to Mr. Broadhead's testimony, and that of the record of the lower court, for Major McLeod's opinion. The whole tenor of Mr. Lenaine's proceedings was calculated to have led Mr. Dias to regard Major McLeod's opinion, as such, and not as a decree, and therefore to mislead a person very partially conversant with English as to the consequences of the line adopted.

'The record of the lower court states, that both parties agreed that the decision given should be considered binding on them as in all civil cases. It depends, therefore, upon the care taken by the lower court to ascertain if Mr. Dias really understood what he was doing, whether the record should entirely overthrow the evident tendency of Mr. Lenaine's preliminary measures to leave an erroneous impression on Mr. Dias' mind. Mr. Broadhead testifies to having heard some one question asked Mr. Dias; but the witness neither heard the question, nor did he hear a reply from Mr. Dias, so that it is not clear how far the appellant may have had matters explained to him.

'The presumption to be drawn from the instrument in Mr. Gordon's hand-writing, signed by Mr. Dias, and dated the 14th May 1846, militates against appellant's having understood the proceedings carried on by Mr. Lenaine; for the instrument in question appoints and authorizes Mr. Gordon to settle all Mr. Dias' outstanding accounts with Mr. J. Bondville (particularly his agreement with him for timber) and confirms and agrees to any settlement come to on behalf of Mr. Dias by Mr. Gordon, and that his receipt was to be considered a discharge in full.

‘After so well considered and explicit an instrument shewn to Mr. Bondville, and partly acted upon by him, it is highly improbable that Mr. Dias should have regarded that the opinion asked for was to be a decree; and, unless such instrument as that addressed in favor of Mr. Gordon were specifically abrogated by a subsequent agreement in favor of any other person, it must be considered as a clear exposition of the appellant’s purpose.

‘A subsequent agreement was made between Mr. Lenaine and Mr. Dias, empowering the latter to sell to the commissariat department 300 logs of timber, and quoting the agreement of the 31st July 1846, and the penalty to be paid on that agreement, which the subsequent agreement states may be deducted and given; but it conveys no powers to settle accounts,—in no way abrogates the authority given to Mr. Gordon, with reference to Mr. Dias’ affairs with Mr. Bondville,—and is of such character as might by Mr. Dias have been granted to Mr. Lenaine: the question of the penalty of 9,000 rupees, being no further settled than on the opinion asked for and received. Moreover, this subsequent agreement is not written by the appellant, but by Moungh Gway, a person in intimate connection with Mr. Lenaine.

‘As this court regards this decision as irregular, the point is of no further importance than to develop how far the grounds of appeal, based on Mr. Lenaine’s conduct, have any foundation.

‘The statement made by the appellant, in explanation of his grounds of appeal, appears to this court to involve the following points of consideration:—

‘*First.* The agreement and its terms.

‘*Second.* The authenticity of the agreement.

‘The appellant’s contest of the authenticity of the agreement, arising from what he states to have been his understanding of the terms of the agreement to which he originally attached his signature.

‘The agreement is also a receipt for the advance of Company’s rupees 2,522-4, which sum is described as being ‘the amount advanced to me for all the timber I have to come down from the Young Yeen forests, more or less (500) five-hundred logs, the whole to be made over, &c. &c.’ The penalty runs: ‘and should the timber as abovementioned.’ The document is in the hand-writing of Mr. Bondville, and bears a signature purporting to be that of Camillo Dias. The agreement was not registered.

‘The ambiguity of the agreement consists in the use of first a general, and then a specific wording: first ‘all the timber;’ subsequently explained by ‘more or less (500) five-hundred logs.’ Had the document been in the hand-writing of Mr. Dias,—had it been proved that the agreement was read out to him,—that Mr. Dias was a competent English scholar, the Court would have had no hesitation in giving the respondent the advantage of an ambiguity for which the appellant was clearly chargeable, whether on the score of pur-

pose and intention, or of negligence : but the case is different under the peculiar circumstances of the appellant. The introduction of the specification of ' more or less (500) five hundred logs,' after the more general and unqualified expression and the subsequent reference, which appears to have little meaning [unless the words,— ' timber as abovementioned,'—apply to the specification of the quantity ' more or less (500)'], have the appearance that the intention of the agreement was for a quantity of timber of about 500 logs ; and, under the supposition that the agreement before the court is that signed by C. Dias, it tallies with the impression on the appellant's mind that he signed an agreement which he understood to be for 500 logs, and not for all his timber. The advantage to be derived from the ambiguity of the instrument being clearly in favor of the person who penned it, and the specification introduced being corroborative of a certain quantity having been under discussion at the time of the agreement being made, the court is, under the peculiar circumstances of the case, led to give the appellant the advantage of the ambiguity.

' It appears to the court, that the appellant has been led to doubt the authenticity of the agreement mainly upon two grounds, viz. the impression on the appellant's mind that the agreement was for 500 logs, and not for the whole of his timber ; and a dissimilarity in the signature which purports to be his from the manner in which the appellant usually signs his name.

' The agreement appears written at the same time, with the same ink, and on similar paper to that used in the orders given on the same day to the appellant for the advance. The agreement is free from erasures, or the appearance of any, and is attested by the signatures of two witnesses, one of whom gives his testimony to his signature. A third person, present when the document was drawn out, attests the signature of the second witness (Adam Sahib) stated to have quitted Moulmain four months ago. With* the attesting and non-attesting witness give evidence to having seen Mr. Bondville and Mr. Dias sign, but neither witness heard the agreement read, or knew the details of its contents ; so far, therefore, as the evidence to the fact that Mr. Dias was seen to sign an agreement, it is to the court more satisfactory than the evidence adduced to prove that one of attesting witnesses to the deed subsequently denied having seen Mr. Dias sign a document. The absence of Adam Sahib is rather in favor of, than hostile to the authenticity of the agreement.

' In the course of the proceedings, the court was enabled to compare 41 signatures of Mr. Dias with that of the agreement. Were the authenticity of the agreement to rest entirely on this comparison of signatures, the court would have felt no confidence whatever in the authenticity of the agreement ; for out of

* Sic original—should be ' Both.'

the 41 signatures, there was only one which bore resemblance, and that not a satisfactory resemblance to the signature on the face of the agreement. In fact the court, on a comparison of signatures, would have rejected the document as unauthentic.

‘The testimony to the fact of Mr. Dias’ having signed a document, and the circumstantial evidence that it must have been the agreement before the court is, on the whole, more satisfactory than the conclusion which would have been drawn from the mere comparison of signatures ; and therefore the court holds the document as authentic.

‘The appellant completely failed to establish by evidence a request he stated having made, when laying very ill, to Mr. Bondville, and which was of a character to prove the existence on his mind at that time of believed approaching death, that the agreement was only for 500 logs.

‘The conduct of Mr. Bondville in connection with Mr. Lenaine, after having seen the powers entrusted to Mr. Gordon by Mr. Dias, appears open to objection ; but the conduct of the latter, whether attributable to ignorance or facility, is also not free from objection ; and much of the complication of the case is fairly attributable to the conduct of the appellant.

‘The court finds the decision of the lower court irregular. The agreement is in the court’s opinion authentic, but its terms vague and ambiguous ; and that ambiguity fairly attributable to the writer of the document, the respondent. The court therefore, under the peculiar circumstances of the appellant as to incompetent knowledge of English, deems it just that he shall have the advantage of an ambiguity, which he was unlikely, at the time the instrument was drawn out, to be able to correct, and which very ambiguity evidences that the specific quantity, for which the appellant acknowledges himself to have been under engagement, must have been the subject of discussion at the time. The court, therefore, regards the agreement to have been for about 500 logs ; and as the appellant appears to have delivered more than that quantity, viz. 548 logs, the court regards the terms of the agreement as fulfilled.

‘The court however warns the appellant against the consequences of a loose manner of placing his signature to documents, the exact purport of which he may not understand ; and that on the present occasion, but for the internal evidence presented by the ambiguity on the face of the agreement, the result of such negligence would necessarily have fallen on the appellant ; it being his duty to make himself acquainted with the exact tenor of any paper to which he may attach his signature.’

From this order the present appeal is brought.

The proceeding before Major McLeod is altogether irregular. It cannot be viewed as a decision of a civil court of justice in a

case pending before it: this is evident from the fact, that Major McLeod required from the parties an expression of their consent that his decision should be binding. If he had acted as a court of justice, such a special agreement was unnecessary. His proceeding was therefore that of an arbitrator; and, as such, is binding only in so far as the parties agreed to his arbitration. I do not consider a record under the signature of the arbitrator himself, sufficient proof as to the extent of arbitration submitted to him; there must be some better proof on this point. The evidence, independent of the fact abovementioned, is by no means conclusive or satisfactory on this point. I therefore consider the authority of Major McLeod to arbitrate as not proved; and his decision of no weight whatever. Even if it were proved that he was duly appointed arbitrator, his proceeding to enforce his own award, by seizing and delivering 9,000 rupees belonging to the defendant, C. Dias, without any suit to enforce that award, was altogether illegal. The terms of the agreement, under his own signature, were only that the decision should be binding; not that it should be liable to be enforced summarily without suit in court.

The case is, therefore, open to decision on its merits. I find the claim is made on a bond, which, though questioned, is, in my opinion, borne out by the evidence. I see no reason to doubt that it was fairly executed. I must therefore look to the bond as explaining the nature of the contract. This is the conclusion to which the commissioner has come; he adds, very fairly, that as it is proved that the claimant wrote the bond himself, and that the defendant also signed it, was but imperfectly acquainted with the English language, any ambiguity in the terms should be interpreted in favor of the defendant. This would be a matter of equity; but I see no reason to have recourse to that principle in the present instance. The bond is sufficiently clear in its terms. It is an agreement to sell 'all the timber I have to come down from the Toung Yeen forest, more or less 500 logs,' at a certain price, 13 rupees per log. If the timber should arrive, and not be made over, a penalty of 30 rupees a log to be forfeited. It appears that 547 logs were made over, at 13 rupees, under this contract; but 300 more logs were brought down, and otherwise disposed of. On these, Mr. Bondville claims the penalty of 30 rupees each, or 9,000 rupees.

Now, the expression, 'all the timber I have to come down,' is indefinite; and to make a claim under those terms, the quantity of timber ready to come at the date of his giving the bond must be proved; but no such proof is offered. The circumstance that more than 500 logs actually came down afterwards, is not alone proof that at the time of executing the bond the defendant expected more than 500. On the other hand, the mention of 500

logs, more or less, in the bond, is proof that the quantity expected was about so much. I conceive, therefore, that the contract is good only for the quantity specified, or for some unimportant quantity, more or less than that mentioned. In making over 547 logs, therefore, the defendant fulfilled his contract, and is liable to no penalty. Ordered that the decision of the commissioner, Captain Durand, be affirmed, and the appellant pay the costs of appeal.

THE 29TH JUNE 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 334 OF 1847.

*Regular Appeal from a decision passed by the Additional Principal
Sudder Ameen of Hooghly, April 30th, 1845.*

RANEE PREEA DASSEE AND PUDDABUTTEE DASSEE,
(PAUPERS) APPELLANTS, (PLAINTIFFS,)

versus

CHUNDURNATH DUTT AND DEBENDERNATH TAGORE,
AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Gour Hurree Banerjee.

*Wukeels of Respondents—Pursun Komar Tagore and Ram
Pran Raee.*

SUIT laid at rupees 28,065-3-12, for possession of certain real property, together with mesne profits and interest.

This suit was instituted by the plaintiffs, on the 16th June 1843, in *formd pauperis*, to recover from the defendants certain property alleged to have been purchased by their deceased husband, Hurrischunder Bose, at a sale held by the sheriff of Calcutta on the 19th April 1827. The property was sold in two lots. The first lot consisting of the following 8 *mouzahs* :—Badeh Mankoonda, Kishenbattee, Bulramputtee, Nershadpore, Baraset, Madhubpore Gopalbattee, Salindee, and Sumbobuttee, was purchased for 7,500 rupees; and the second lot consisting of 3 *mouzahs*, viz. Majerhaut, Chowghatta, and Anund Bagh, was purchased for 440 rupees. The plaintiffs alleging that the defendants hold possession of the property, have sued them for recovery.

The principal sudder ameen has nonsuited the plaintiffs, in consequence of the property sued for not having been properly valued, and because the extent of a portion of the land, which will be more particularly noticed below, has not been given.

The plaint sets forth that the first lot consists of an assessed estate, and the plaintiffs have accordingly sued for it at three times the *sudder jumma*, which is perfectly correct. The valuation on this part of the claim is as follows:—

<i>Sudder jumma</i> 1,747 10 11	× 3 =	5,242	15	14½
Mesne profits,		11,875	12	7½
Interest,		10,277	2	0
		<hr/>	<hr/>	<hr/>
		27,395	14	2
		<hr/>	<hr/>	<hr/>

The plaintiffs further state, that the *mouza*hs Majerhaut and Chowghatta, form a portion of an assessed estate; but that not being able to ascertain the exact amount of assessment upon them, they have valued this part of their claim at *Sicca* rupees 440, or Company's rupees 469, the amount paid for the *whole* lot at the sheriff's sale.

*Mouza*h Anund Bagh, included in the above lot, is now stated by the plaintiffs to be a garden of *lakhiraj* land, and has been sued for at its estimated price of 200 rupees. It is of this garden that the principal sudder ameen is of opinion the extent should have been stated.

The valuation of the 8 *mouza*hs in *turuf* Badeh Mankoonda, is perfectly correct.

No legal objection can be taken to the principle of valuation in the case of the two villages, Majerhaut and Chowghatta. These villages do not form a separately assessed estate, or a fractional portion of one. There is nothing wrong therefore in the plaintiffs having valued them at their selling price. Whether the price has been correctly estimated is another question, which cannot now be entered upon, as the defendants have not made any objection upon that ground.

The principal sudder ameen holds that the garden, Anund Bagh, should have been valued upon the principle upon which *lakhiraj* land is required to be valued under the note at Article 8, Schedule B, Regulation 10, 1829,—that is at 'eighteen times the annual rent by computation.' The plaintiffs however plead, that under the last clause of that note a garden, of whatever kind, might be valued at its selling price. Did the determination of the case depend solely upon this point, it would be for the consideration of the Court whether under Section 3, Regulation 4, 1793, and the clause of the note above alluded to, a garden consisting of *lakhiraj* land, yielding no rent to its owner, but held directly by him, should, or

should not, be valued for the purposes of suit at its estimated selling price.

The plaintiffs, however, have been guilty of a fatal error in not giving either the extent or boundaries of the *lakhiraj* garden sued for, and in neglecting to apply for permission to supply the omission by a supplementary plaint.

As this was essential to the investigation of the claim, the principal sudder ameen's order of nonsuit must be upheld.

We accordingly affirm the decree of the principal sudder ameen, with all costs against the plaintiffs. On this last point, the usual order in pauper cases will issue.

THE 29TH JUNE 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 57 OF 1847.

*Regular Appeal from a decision passed by Mohummud Nazim,
Principal Sudder Ameen of Dacca, November 9th, 1846.*

GOOROO DAS RAE, AND MUSST. RAM RUNGONEE,
WIDOW OF DURGA DAS RAE, APPELLANTS, (PLAINTIFFS,)

versus

MOONSHEE MUFEEZOODDEEN AND OTHERS,
RESPONDENTS, (DEFENDANTS.)

*Wukeels of Appellants—J. G. Waller and Gobind Chundur
Mookerjee.*

Wukeel of Respondents—Hamid Russool.

SUIT laid at 10,000 rupees, for possession of real property, mesne profits and interest, on reversal of orders passed by the criminal courts, under the provisions of Regulation 15, 1824, in favor of the defendants.

The plaint sets forth, that certain of the defendants held, under a decree of court, a *talook* in the estate of the ancestors of the plaintiffs, chargeable with a *sudder jumma* of rupees 697-1-8, and a *talookdaree* profit, payable to the plaintiffs' ancestors, of rupees 41 per annum. That on the defendants failing to pay the Government dues, the plaintiffs' ancestors paid them for a succession of years, in order to prevent the sale of the *talook* for arrears; and having sued for recovery of the amount so paid, obtained a decree

for rupees 4,835-10-19, in execution of which the *talook* was sold and bought in the name of Hurnath Rae, cousin of the plaintiff, for 15,000 rupees. It appears, however, that certain members of the family of the defendants had brought actions against the parties who formerly held the *talook*, claiming shares therein by right of inheritance, and obtained decrees for fractional portions. They asserted their right under these decrees, and were opposed by the auction purchaser, who claimed the entire *talook* in virtue of his purchase. This led to disputes, which at length brought the matter under the cognizance of the criminal courts. The case was investigated under Regulation 15, 1824, in regard to a 4 *annas*' share which formed the subject of one of the decrees. This suit in the criminal courts was between Hurnath Rae and Ram Ruttun Rae on the one part, and the defendants on the other part; and was decided by the magistrate in favor of the latter, on the 1st January 1834. Hurnath Rae appealed to the commissioner of circuit, who, on the 22d April 1834, confirmed the magistrate's order. The plaintiffs alleging that the *mehal* of which the lands now contested form a portion, is in their possession, sue to set aside the orders of the criminal courts; and for this purpose instituted the present action on the 27th March 1846; stating further that up to the year 1243 B. S., or 1836, A. D., they were minors.

The defendants pleaded the judgments in their favour as a bar to the claim. They also urged that Hurnath Rae should have been made a party to the suit, and that the action is barred by the rule of limitation as laid down in Section 14, Regulation 3, 1793.

The principal sudder ameen has noticed the fact of Hurnath Rae not having been a party to the suit; but yet has dismissed the plaint under the law of limitation, as not having been brought within 12 years from the date of the magistrate's order.

We are of opinion, that if the principal sudder ameen considered it necessary that Hurnath Rae should have been a party to the suit, he ought not to have dismissed the plaint on the ground taken by him, but have passed an order of nonsuit.

We are further of opinion, that the principal sudder ameen has erred in regard to the law of limitations. If the period allowed for institution of the suit is to be calculated from the date of the order of either of the criminal courts, it must be from that of the commissioner's order; and the suit has been instituted within 12 years from that date. Besides this, the principal sudder ameen has taken no notice of the plaintiffs' plea of minority.

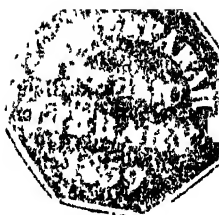
The plaintiffs, however, have committed a fatal error in not having brought in the parties to the case under Regulation 15, 1824. The property was purchased in the name of Hurnath Rae, and the suit under Regulation 15, 1824, was carried on by him and his brother, Ram Ruttun Rae, against the defendants. These persons (Hurnath Rae and Ram Ruttun Rae) are still alive; and there is

nothing on the record to shew an assignment or conveyance of the lands to the plaintiffs.

Notwithstanding that this error was pleaded in the defence, the plaintiffs have failed to rectify it. They made no application to the lower court for permission to file a supplementary plaint, nor have they even admitted, in their petition of appeal, that they were in error, but defend their plaint as perfectly correct.

We have therefore to decide upon the correctness of the plaint as it stands ; and being of opinion that the suit cannot be carried on in the absence of the parties to the case under Regulation 15, 1824, except upon proof of the property having legally devolved upon the plaintiffs, who then would appear as the representatives of the parties from whom they derive their right, we over-rule the principal sudder ameen's order of dismissal, and nonsuit the plaintiffs, who will pay the costs of both courts. .

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THE 1ST MARCH 1848.

PRESENT :

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 323 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, July 22d, 1845.

RAJAH SUTTOCHURN GHOSAL, APPELLANT,
(DEFENDANT,)

versus

HURMOHUN BISWAS AND ANOTHER, (PAUPERS) RESPON-
DENTS, (PLAINTIFFS.)

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeel of Respondents—Taroke Chundur Raae.

CLAIM for 2 annas talook of Bejeye-ram Biswas, and the reversal of sale in execution of a summary decree.

The plaintiffs stated, that the sale in question took place in 1834, when the collector had no authority to sell landed property in execution of a summary award; that it was consequently illegal, and must be set aside. The defendant asserted the regularity and legality of the sale.

On the 22d July 1845, the principal sudder ameen gave an award in favor of plaintiffs, reversing the sale as illegal; and resting the decision mainly on a previous decision of this Court, No. 101 of 1841, in case of Mudun Kishwur Indoo *versus* Sutto Churn Ghosal.

From this decision the defendant appeals, alleging that the sale took place by order of the civil court.

The terms of Act 8, 1835, distinctly declare that the collector could not sell landed property, previous to the issue of that Regulation, in execution of his own summary award; and the Act goes on to confer this power for the future on the collector. The appellant now states that the civil court ordered the collector to sell, and that, if the authority to sell was thus made over to the collector, he became competent in the particular case; but no such authority, or order, on the part of the civil court, is produced: on the contrary, a proceeding of the judge, of the 1st November 1832, in this very case, directs that the notice shall issue from his own court, and the sale take place there also,—this order being passed with reference to the general opinion expressed by the court of appeal, regarding the manner in which such sales were to be effected in execution of summary decrees, in a proceeding of the 19th June 1832. The appellant has not therefore made out

his case ; and there is no reason to doubt the correctness of the decision of the principal sudder ameen. Ordered, that that decision be affirmed : costs against appellant.

THE 1ST MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 685 OF 1847.

IN the matter of the petition of Juggut Tara Chowdhraïn and others, filed in this Court on the 11th November 1847, praying for the admission of a special appeal from the decision of the principal sudder ameen of Tipperah, under date the 24th July 1847 ; reversing that of the moonsiff of Toorkeebaghra, under date 5th February 1847, in the case of the petitioners, plaintiffs, *versus* Rumzan Banoo and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

This was an action for recovery of arrears of rent ; and was decided *ex parte* by the moonsiff in favor of the plaintiffs. The principal sudder ameen reversed the decree of the moonsiff on the merits of the case, without first calling upon the defendants to shew cause for their default in the lower court. This is contrary to the Circular Order of the 12th March 1841.

I accordingly admit the appeal ; and remand the case to the principal sudder ameen, that he may conform to the provisions of the Circular in question.

THE 2^D MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 704 OF 1847.

IN the matter of the petition of Gunga Purshad Behari and Ruggoonath Behari, filed in this Court on the 11th November 1847, praying for the admission of a special appeal from the decision of Mr. G. C. Cheap, judge of zillah Rajshahye, under date the 5th August 1847 ; modifying that of the principal sudder ameen of Rajshahye, under date 26th December 1845, in the case of Hurish Chundur Shaw, plaintiff, *versus* the petitioners and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

This was a suit to recover sums of money deposited in a banking house, belonging to one Gunesh Purshad Behari, a minor, for whom the petitioners were trustees. The particulars of the case are given at page 25, of the Decisions of Zillah Rajshahye for the year 1847.

The principal sudder ameen exempted the petitioners from liability; but, in this respect, his decree was altered by the judge, who, in his judgment, after declaring that the plaintiff was entitled to recover from the *kothee*, proceeds in his decretal order to direct that he shall recover, among others, from the petitioners, trustees of the *kothee*, or banking house of Gunesh Purshad Rae. This order is not sufficiently specific, as it does not say whether the petitioners are *personally* liable for the amount, or only in their capacity of trustees. I admit the appeal on this one point; and remand the case, in order that the judge may draw up his decision more distinctly as to the liability of the petitioners,

THE 2D MARCH 1848.

PRESENT :

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 366 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, August 20th, 1845.

COLLECTOR OF RUNGPORE, AFTERWARDS, IN HIS PLACE,
RANEE SURN MAYE, APPELLANT, (PLAINTIFF,)

versus

GUDADHUR CHOWDHREE AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wuheels of Appellant—Pursun Komar Thakur and Nilmoney Banerjee.

Respondents Defaulting.

CLAIM for rent of *pergunnah* Gyburee, in *pergunnah* Balinbund, for the year 1234, with interest: laid at rupees 9,090.

The plaintiff claimed rent of the estate for the year 1234, from the defendants, as farmers, and their sureties; explaining, with reference to the delay in bringing forward the claim, that a suit was formerly brought for this rent by Rajah Hurreenath Rae; but the judge nonsuited him under date the 17th April 1832, or the Bengalee year 1239. Six months afterwards Rajah Hurreenath died. A long interval of minority of his son, Kishennath Rae,

then intervened. On attaining majority, this claim was again brought forward in court by Kishennath Raee in 1249. After his death, the collector of Rungpore appeared in his stead ; and, subsequently, Ranee Surn Maye, the present appellant, the widow of Kishennath Raee.

The defendant denied the justice of the claim ; and urged that the suit could not now be heard by reason of lapse of time.

On the 20th August 1845, the principal sudder ameen declared that the 12 years allowed by law must count, not from the date of nonsuit, but from the date on which the cause of action arose,—that is, from the end of 1234, when the rent claimed became due: the time had therefore elapsed. He dismissed the claim on this ground.

The plaintiff appeals, urging that the time of minority has not been deducted in the computation of the legal period.

The principal sudder ameen has correctly decided, that the 12 years must count from the date on which the cause of action arose, viz. that of the defendant's falling in balance; but the period of the minority of Kishennath Raee, viz. from *Aghun* 1239, the date of Hurreenath Raee's death, till 1247, when Kishennath Raee reached majority, upwards of 7 years must be deducted. This has been entirely overlooked by the principal sudder ameen. The total period from 1234, till the date of suit (1249) is 15 years: deducting the 7 years above-mentioned, there remains only 8 years delay in bringing this suit. The claim therefore is entitled to judicial investigation and award; and the principal sudder ameen's decision is erroneous and incomplete. Ordered, that the case be returned for revision to the principal sudder ameen, with directions to restore it to its place in the file, and to decide it over again on its merits after full investigation. The amount of stamp, on the petition of appeal, to be returned.

THE 2D MARCH 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 689 OF 1846.

IN the matter of the petition of Baboo Kishen Purshad Sahee, *alias* Kishen Komar Sahee, filed in this Court on the 15th September 1846, praying for the admission of a special appeal from the decision of Mr. H. V. Hathorn, judge of zillah Sarun, under date the 23d June 1846; reversing that of Syud Imdad Ali, principal sudder ameen of the said zillah, under date the 30th April 1844, in the case of Baboo Kishen Purshad Sahee *alias* Kishen Komar

Sahee, plaintiff, *versus* Musst. Dhurm Kowur and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

This suit, for Company's rupees 533-5-4, and another for Company's rupees 1,066-10-8, (disposed of this day, under No. 688), were instituted by the petitioner, on the 26th July 1843, to recover the sums mentioned; the same being the amount of two bonds, dated the 16th and 25th *Poos* 1229 *Fuslee*. His plaint sets forth, that the defendants had borrowed from him the principal sum of *Sicca* rupees 1,500, and had executed two separate bonds for *Sicca* rupees 1,000 and 500, on the above dates; stipulating to repay the same, with interest at 1 per cent. per mensem, by the end of 1234 F. That the defendants had also, on the latter date, executed a deed of agreement (*ikrarnaméh*) in favor of the petitioner, assigning the sum of 180 rupees yearly from the rents of *mouzdhs* Simree and Bunkut (held in farm by Rughoobur Das) in lieu of interest, and which the petitioner continued to enjoy till the 8th June 1843, when the village of Simree was sold for arrears of Government revenue; and the interest ceasing to be paid as before, these suits were brought to recover the amount of the bonds.

The principal sudder ameen decided, that the bonds were proved; that the plaintiff (petitioner) had objected to the sale of the village on account of the lien he had upon it; that he obtained a decree for rent of the said village (Simree); that, as regards lapse of time, interest is admitted (by the petitioner) to have been paid to 1250 *Fuslee*; that he was in fact in possession of Simree and Bunkut, assigned for the payment of interest, inasmuch as Rughoobur Das, in whose name the lease was executed, was his servant, &c.; and passed decree in his (petitioner's) favor for the amount of his claim, with costs and interest.

The judge reversed the above decision under the statute of limitation (which had been pleaded by the defendants), observing that 'the separate assignment alleged to have been made for the payment of yearly interest from the profits of a farming lease, held by a third party, could only be regarded, if the document were valid, as security for the payment of the bonds at the time stipulated: had the lease been granted to the plaintiff, in consideration of the advance, it would have been equivalent to a mortgage (precedent cited); but the lease in this case was to a different party, whose name is not in the bonds; and there is no proof of any connection between Rughoobur Das, the lessee, and the plaintiff. The principal sudder ameen observes that plaintiff was in actual possession, and that Rughoobur Das was his servant; but this is an assumption, unsupported by any proof.'

Now, with reference to these remarks, I observe, that the latest payment and receipt of interest on an original debt, has been repeatedly ruled to determine the period of the right of action. That a decision passed by the moonsiff of Chuprah, on the 7th September 1841, shews, that this petitioner sued for an arrear of rent on *mouzah* Simree, upon the strength of the documents now produced, the lease of the village having been granted and accepted, as, or in lieu of, interest, in the name of Rughoobur Das ; between whom and the petitioner the connection pleaded would thus appear to be sufficiently established. If the decision in that case (which is not before the court, though filed with the zillah proceedings) was based upon the *ikrarnaméh* (not disproved,) and was passed by the moonsiff in the petitioner's favor, or in acknowledgment of his lien upon the village, the statute of limitation would not appear to have been infringed ; but there is no record of any enquiry having been made by the judge into these pleas, upon which a just result would appear to have so materially depended.

It is therefore ordered, that the case be returned for revisal, and decision, after a due consideration of the evidence in regard to the points mentioned, and of any further which the parties may choose to adduce ; and that the usual proceeding be observed in respect to stamps and costs.

THE 2D MARCH 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 688 OF 1846.

IN the matter of the petition of Baboo Kishen Purshad Sahee *alias* Kishen Komar Sahee, filed in this Court on the 15th September 1846, praying for the admission of a special appeal from the decision of Mr. H. V. Hathorn, judge of zillah Sarun, under date the 23d June 1846 ; reversing that of Syud Imdad Ali, principal sudder ameen of the said zillah, under date 30th April 1844, in the case of Baboo Kishen Purshad Sahee *alias* Kishen Komar Sahee, plaintiff, *versus* Musst. Dhurm Kowur and others, defendants.

It is hereby certified that the said application is granted on the same grounds as those set forth in No. 689, (preceding) disposed of at this day's sitting. The same order will issue for revisal and disposal of the case ; and the same proceeding be observed in respect to stamps and costs.

THE 6TH MARCH 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 754 OF 1847.

IN the matter of the petition of Shibchundur Surmah and others, filed in this Court on the 29th November 1847, praying for the admission of a special appeal from the decision of Mr. C. Mackay, principal sudder ameen of Mymensingh, under date the 28th August 1847 ; reversing that of the sudder moonsiff of Mymensingh, under date the 22d April 1846, in the case of the petitioners, plaintiffs, *versus* Batool Dhur and others, defendants.

It is hereby certified that the said application is granted on the following grounds:—

This was an action for recovery of a sum of money, alleged to have been lent on bond; and was instituted by the plaintiffs against the borrowers and their surety. The borrowers did not appear, and the surety was the only one who defended the suit.

The sudder moonsiff gave judgment for the plaintiffs ; but, on the appeal of the surety, his judgment was reversed by the principal sudder ameen.

The principal sudder ameen takes exception to the plaintiffs' witnessses on the score of age, considering that some of them must have been minors at the date of their alleged attestation of the bond. He proceeds upon personal inspection and his own judgment of their appearance ; and, further, concludes against the evidence of the witnessses, because they do not speak correctly of each other's ages. The evidence of an illiterate and ignorant man, in regard to the age of another, is no ground for rejecting his evidence to the attestation of a fact which he declares he witnessed. Considering the investigation of the principal sudder ameen to be very imperfect ; and, under the circumstances, to have very little to say to the real merits of the case, I admit the appeal, and remand the case for further investigation, and decision *de novo*, with reference to the foregoing remarks.

THE 6TH MARCH 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 748 OF 1847.

IN the matter of the petition of Telukmun Ojha, filed in this Court on the 26th November 1847, praying for the admission of a special appeal from the decision of Mr. H. V. Hathorn, judge of

Sarun, under date the 28th August 1847; reversing that of the moonsiff of Chumparun, under date 27th June 1847, in the case of the petitioner and others, plaintiffs, *versus* Bhikdari Thakur and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

This suit was instituted to recover the value of a rice crop, alleged to have been cut and carried away by the defendants, the farmer (and his surety) of the village in which the lands are situated. The moonsiff gave judgment for the plaintiff's, who assert that they hold the lands under a *birt* tenure, and pay no rent for the same.

The judge, in reversing the moonsiff's judgment, thus decides, 'plaintiff's claim to hold under a *birt* tenure, which is evidently the object of this suit, must be rejected; and he must pay rent for his land according to the *pergunnah* rates.'

The claim was a specific one for the value of a crop; and the judge not only decides upon the invalidity of a tenure, which possibly might have been involved in the decision of the suit, but he also proceeds to fix the rates at which the plaintiffs must hereafter pay their rents. This is going beyond the exigency of the case; and the judge should have satisfied himself with either decreeing, or dismissing the plaintiff.

I accordingly admit the appeal; and remand the case, in order, that the judge may dispose of it again, simply with reference to the claim as set forth in the petition of plaintiff.

THE 6TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 742 OF 1847.

IN the matter of the petition of Ramnurain Mookerjee and others, filed in this Court on the 24th November 1847, praying for the admission of a special appeal from the decision of Osman Ali, principal sudder ameen of Hooghly, under date the 19th August 1847; reversing that of the sudder ameen of Hooghly, under date the 15th September 1846, in the case of Sutputtee Dasse and others, plaintiffs, *versus* the petitioners, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The defendants in this case had obtained a money decree against one Surbanund Rae; and, in execution thereof, had procured the sale of certain lands, to which the present plaintiffs set up a claim. Their claim was summarily rejected, and they instituted the

present action to establish their right, and procure reversal of the sale.

The sudder ameen dismissed the plaint; but the principal sudder ameen reversed his judgment, and decreed for the plaintiffs.

The claim set up by the plaintiffs, is one of purchase from the debtor, Surbanund Raee, and should have been thoroughly sifted. Only one witness was examined in the course of these proceedings; and he denied all knowledge of the deed of sale which he was called to prove. Copies of the depositions of two other witnesses, taken in the summary proceedings, were filed; and it is upon these that the principal sudder ameen has, in a great measure, relied. These witnesses are dead; but there is another living witness to the deed of sale, and he should have been called. In addition, moreover, to the mere fact of the execution of the deed of sale, some enquiry and record of opinion should have been made, as to whether the transfer was, or was not, a fraudulent transaction, with a view to defeat the claims of the decree-holders against Surbanund Raee.

Considering the investigation of the principal sudder ameen to be very insufficient, I admit the appeal; and remand the case to be tried *de novo*, with reference to the foregoing remarks.

THE 7TH MARCH 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 766 OF 1847.

IN the matter of the petition of Khatoon Mehtoon, filed in this Court on the 9th December 1847, praying for the admission of a special appeal from the decision of the principal sudder ameen of Hazareebaugh, under date the 4th September 1847; reversing that of the moonsiff of Hazareebaugh, under date the 29th April 1847, in the case of the petitioner, plaintiff, *versus* Domun Mehtoon, defendant.

It is hereby certified that the said application is granted on the following grounds:—

The plaintiff sued to recover damages for injury done to his crops, by certain proceedings of the defendant in regard to a water-course, which led to the plaintiff's land being inundated, and his crops destroyed; and also for protection against similar proceedings in future.

The moonsiff stated the issue of the suit correctly, in saying that the question between the parties was simply one of damages, and for the future prevention of the injury complained of. He

took evidence to the facts alleged by the contending parties ; and finally gave judgment for the plaintiff.

The principal sudder ameen, on the other hand, says that the real question at issue is a boundary dispute ; and refers the plaintiff to an action to settle the boundaries between his own land and that of the defendant.

The moonsiff is clearly right, and the principal sudder ameen wrong. All that the principal sudder ameen has to decide, is, whether the plaintiff has been endamaged by the defendant, or not ; and to give judgment accordingly. If he is satisfied with the evidence for the plaintiff, he will, of course, pronounce in his favor ; if not, he will simply dismiss his claim, leaving it to the plaintiff's own discretion to adopt any other remedy he may choose. I accordingly admit the appeal ; and remand the case to the principal sudder ameen to be dealt with as above pointed out.

THE 7TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 775 OF 1847.

IN the matter of the petition of Sheikh Bundhoo, filed in this Court on the 9th December 1847, praying for the admission of a special appeal from the decision of Mr. C. Mackay, principal sudder ameen of Mymensingh, under date the 9th September 1847 ; reversing that of the moonsiff of Ghousgaon, under date the 15th July 1846, in the case of the petitioner, plaintiff, *versus* Gouree Purshad and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

This was a suit instituted by the plaintiff to contest a demand of rent made by the defendants. The defendants had attached the plaintiff's property for a balance of 36 rupees, 3 *annas*, and 4 *pie*, principal and interest. The plaintiff deposited the amount ; but, having failed to bring his summary action within the period allowed by Section 15, Regulation 5, 1812, he instituted the present suit to try the justness of the demand.

The moonsiff gave judgment for the plaintiff on the merits of the case. The principal sudder ameen, however, bars the plaintiff from his remedy by a regular action ; because he did not avail himself, in time, of his summary remedy.

As the principal sudder ameen is altogether wrong on this point, we admit the appeal ; and remand the case that it may be tried in the court of first appeal on its merits.

THE 7TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 776 OF 1847.

IN the matter of the petition of Sheikh Goondoo, filed in this Court on the 9th December 1847, praying for the admission of a special appeal from the decision of Mr. C. Mackay, principal sudder ameen of Mymensingh, under date the 9th September 1847 ; reversing that of the moonsiff of Ghousgaon, under date the 15th July 1846, in the case of the petitioner, plaintiff, *versus* Gouree Purshad and others, defendants.

This is a case of precisely the same nature as the preceding one (petition No. 775 of 1847,) and the same order is passed.

THE 7TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 772 OF 1847.

IN the matter of the petition of Nuffer Chundur Hoeë, filed in this Court on the 9th December 1847, praying for the admission of a special appeal from the decision of Mr. A. Smelt, judge of East Burdwan, under date the 27th September 1847 ; reversing that of the moonsiff of Samunty, under date the 6th August 1847, in the case of the petitioner, plaintiff, *versus* Ramchurn Race and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff sued for possession of a tank, and the value of fish taken therefrom by the defendants. A great mass of evidence was taken by the moonsiff, and sundry local investigations made ; and, upon a full consideration of these, he decided in favor of the plaintiff.

The decision of the judge, reversing the moonsiff's decree, is given at page 101 of the Decisions of the judge of East Burdwan for the year 1847. The judge gives three reasons for the order of reversal :—*first*, that, on an inspection of the plaintiff's *pottah*, he is not satisfied as to the genuineness ; *secondly*, that certain statements of the plaintiff, as to the period of his having had pos-

session of the tank, are at variance with each other; and, *thirdly*, that the claim is undervalued.

The last of these points would appear to have been decided before. The plaintiff was nonsuited on this ground; and the case restored to the file by order of the zillah judge. The other two grounds of reversal touch merely the surface of the case: there is no allusion whatever to the body of evidence on record, or to the local enquiries; and the judge might in fact have drawn up such a decree as he has passed, without any perusal of the evidence at all.

Considering the case to have been decided by the judge without any sufficient investigation of its merits, I admit the appeal; and remand the case for trial *de novo*.

THE 7TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 765 OF 1847.

IN the matter of the petition of Boondu Sahoo, and others, filed in this Court on the 9th December 1847, praying for the admission of a special appeal from the decision of the principal sudder ameen of Hazareebaugh, under date the 8th September 1847; reversing that of the moonsiff of Hazareebaugh, under date the 25th June 1847, in the case of the petitioners, plaintiffs, *versus* Khedoo Pasbun and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiffs sued to recover a debt on bond: the defendants pleaded payment. The plaintiffs admitted the payments alleged by the defendants; but asserted that they were made on another account, distinct from the bond on which the present action was based; and that there were various transactions between the parties.

The moonsiff, after a full enquiry, came to the conclusion that the defendants had received credit for the payments made by them, on another account; and the debt now sued for was still due by them. He accordingly gave judgment for the plaintiffs.

The principal sudder ameen, in appeal, summarily overruled the judgment of the lower court; merely observing that the statement of the plaintiffs, respecting the credit given, was not to be believed.

The principal sudder ameen was bound, in reversing the decision of the lower court, to give his reasons for disbelieving the plaintiffs' statement, and for setting aside the evidence on which

the moonsiff relied. His decree is altogether imperfect ; and, admitting the appeal, I remand the case for re-investigation.

The principal sudder ameen, in again deciding this case, will give his reasons fully for the judgment which he may pronounce.

THE 8TH MARCH 1848.

PRESENT :

SIR R. BARLOW, BART.,
JUDGE.

PETITION NO. 8 OF 1848.

IN the matter of the petition of Musst. Noor-o-nissa, filed in this Court on the 19th January 1848, praying for the admission of a special appeal from the decision of the judge of Patna, under date the 13th September 1847 ; affirming that of the principal sudder ameen, under date the 18th September 1845, in the case of Musst. Shookor-o-nissa, plaintiff, *versus* Hoorun-o-nissa and Noor-o-nissa, (petitioner,) defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff sued to establish her right of pre-emption to certain property, against her sister Musst. Hoorun, who sold the same to Musst. Noor-o-nissa, her daughter ; and, in the deed of sale, relinquished all claim to the purchase money.

Musst. Hoorun died while the case was before the principal sudder ameen. Her daughter, the petitioner, in reply, urged that she had long previously purchased the property from her mother, as set forth in the *kewaleh* ; that the plaintiff was cognizant of her purchase, and had, as well as her husband, affixed their seals to the deed ; and that, consequently, plaintiff could not legally lay claim to the right of pre-emption.

The principal sudder ameen, in his vernacular proceeding, gives the following reasons, which the judge has omitted to record in his published judgment, for rejecting the plaintiff's claim, and considering the deed of sale invalid :—*first*, that the terms of the *kewaleh* shew all claim to purchase money was relinquished by the seller ; *second*, that as the seller declared no other party than her daughter was entitled to succeed her, there was no necessity for the execution of such a deed ; *third*, that in the deed some places were erased, and that such a deed could not be recognized by the courts. The judge confirmed his decision, recording his opinion that the case was one of evident collusion between the mother and daughter to put the latter in possession of the property to the exclusion of the rights and claims of others.

The deed of sale, and the actual sale of the disputed property by Hoorun to her daughter, (the petitioner) is acknowledged by

all parties to the suit ; it was not therefore competent to the courts to set it aside, on the *second* and *third* grounds given in the principal sudder ameen's decision. The lower courts have in fact given extra-judicial opinions, by rejecting a deed admitted by the parties in the cause ; and, by so doing, have invalidated a title to the detriment of the defendant, which, until it is legally reversed, must stand good, *quoad* the opposite party. Indeed, the object of the plaintiff is to shew, that the requisitions of the Mahomedan law of pre-emption have been complied with ; and that, *therefore*, her claim is preferable to that of the defendant founded on the sale to her. This sale being admitted by both parties, the case at issue between them is clearly one of law ; and involves the two following questions :—*first*, is a sale to a party, the seller relinquishing all claim to purchase money, valid ? ; and, *secondly*, did the plaintiff, who claims the right of pre-emption, conform to the Mahomedan law ?

The principal sudder ameen and the judge have declared that such a sale is invalid. After consulting with the *Kazee-ol-koozat*, and in concurrence with his opinion recorded in this Court and the authority he has quoted, I am disposed to rule otherwise. The sale was a *bond fide* one, and the relinquishment of purchase money does not affect its validity ; and this is the *first* ground for admission of special appeal.

The *second* is, that the lower courts have not investigated whether the legal process, to establish the right of pre-emption, has been conformed to in this case.

The *third* is, that extra-judicial opinions have been passed, impugning the genuineness and authenticity of a deed, acknowledged by both parties in the cause, and which, *quoad* them, must be binding.

I therefore remand the case for re-trial by the principal sudder ameen, who will restrict his investigation to the enquiry, whether the necessary legal steps were taken by the plaintiff, to ensure her right of pre-emption, and decide accordingly.

THE 8TH MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE ; and

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 784 OF 1847.

IN the matter of the petition of Joydeb Surma, filed in this Court on the 27th December 1847, praying for the admission of a

special appeal from the decision of Mr. C. Mackay, principal sudder ameen of Mymensingh, under date the 24th September 1847; reversing that of the moonsiff of Pingnah, under date the 5th November 1846, in the case of the petitioner, plaintiff, *versus* Lukheenurain Deb, defendant.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff sued the defendant for arrears of rent. The defendant pleaded dispossession of a small portion of the lands included in his holding, for which a *pottah* and *kuboolecut* had been exchanged, and payment of the full amount due by him, which, as stated by him, was covered by receipts granted by the plaintiff.

The moonsiff gave judgment for the plaintiff; but his judgment was overruled by the principal sudder ameen, who states, that, without reference to the evidence for the defence, he is not satisfied with that for the plaintiff, and consequently decides against him.

The pleas in this case were special, and the *onus probandi* rested with the defendant. The principal sudder ameen, contrary to all principle and practice, has rejected the claim, discrediting the evidence for the plaintiff; whereas in fact he had nothing to prove. We admit the appeal; and remand the case to be tried *de novo* with reference to the foregoing remarks.

THE 8TH MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 815 OF 1846.

IN the matter of the petition of Bhugeeruth Das, filed in this Court on the 26th November 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of Furreedpore, under date the 22d July 1846; reversing that of the moonsiff of Sabur, under date the 24th January 1846, in the case of Bhugeeruth Das, plaintiff, *versus* Bishenprea Bewa and others, defendants.

This suit was instituted in the Luchragunge moonsiff's court, on the estimated value of rupees 254.

The defendants demurred that the property was greatly undervalued. This was overruled by the moonsiff, who decreed for the plaintiff. On appeal, the principal sudder ameen sets out with stating, that the suit was not cognizable for several reasons; and,

amongst others, that the value of the property was at least 800, or 1,000 rupees ; and he takes the moonsiff to task for entertaining it, notwithstanding which, he goes on to dispose of the appeal on its merits, and reverses the decision of the moonsiff.

Now, on the principal sudder ameen's own showing, he ought to have nonsuited the plaintiff, without going into the merits of the case. I admit the special appeal therefore, and remand the case to the principal sudder ameen, to be dealt with as the law directs in such cases.

THE 8TH MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 597. OF 1846.

IN the matter of the petition of Jugmohun Mullick, filed in this Court on the 27th August 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of Hooghly, under date the 29th May 1846 ; affirming that of the sudder moonsiff of that district, under date the 27th March 1845, in the case of Jugmohun Mullick, plaintiff, *versus* Bholanath Bhattacharje and others, defendants.

The petitioner, plaintiff in the suit, sued defendants for a balance of rent. Whilst the case was pending in the moonsiff's court, two *ameens* were deputed to make local enquiries ; the expenses of which were defrayed by the plaintiff. Eventually, the moonsiff dismissed the claim. On appeal by the petitioner, the principal sudder ameen ordered a third *ameen* out, and called upon the petitioner to deposit the expenses. The petitioner remonstrated by petition, to the effect that he had already paid more than twice the amount at stake in *ameen's* fees, and was quite willing that his appeal should be decided on the record of the lower court ; but, at the same time adding, that, if the court insisted on it, he was ready to deposit the amount. No order was recorded on this petition ; but the appeal was afterwards dismissed, because the petitioner would not take out the *ameen*.

Considering this to be highly unjust, and unsupported by any regulation, I admit a special appeal ; and remand the proceedings to the principal sudder ameen, who, if the appellant persist in declining to take out a third *ameen*, and rests his case on the proceedings already had in the moonsiff's court, will dispose of the same on the record of the lower court.

THE 8TH MARCH 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 82 OF 1847.

Regular Appeal from a decree passed by the Principal Sudder Ameen of Purneah, Mohummud Rokhnodeen Khan, November 27th, 1846.

SOBNATH MISR, APPELLANT, (PLAINTIFF,)

versus

PUNCHANUND CHUKURBUTTEE, LUKHEE KANTH SEIN, AND RANEE SIDHWUTTEE, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Lutf-ur Ruhman.

Wukeels of Respondents—Gholam Sufdur, Sree Ram Raee, and Ram Pran Raee.

THIS suit was instituted by appellant, on the 9th April 1845, to recover from respondents the sum of Company's rupees 14,175, principal and interest; land-rent due from 1241 to 1244 *Moolkee*, on a half share of *turf* Hoseinpore, in *pergunnah* Kankjool.

Appellant is the son of Noonoo Misr, deceased, who was the brother of Ranee Sidhwuttee. The whole *turf* of Hoseinpore had been purchased by them, (the brother and sister) at the collector's sale, and appellant succeeded to the rights and interests of his father on the death of the latter; but no *dukhil-kharij*, or record of his accession to the property, appears to have been made in the collector's office.

The substance of the plaint, is, that Noonoo Misr and the Ranee bought the undivided estate between them, each paying an equal portion of the purchase money; that, from 1241 to 1244 M., appellant has received only the sum of rupees 1,057-12, for which credit being given, the amount now claimed remains due. That the *pottah* was taken from both the zemindars, but the *kuboolcut* is with the Ranee; that the farmer has withheld the payment of rent to him at the instigation of the Ranee, who has therefore been made a defendant in the suit, which is brought for the sum specified.

The Ranee denies any right on the part of appellant,—the *turf* having been purchased from funds furnished by her, though her brother's (Noonoo Misr's) name was introduced as a joint purchaser. The farmer (Punchanund) denies the claim, on the ground of having received his *pottah* from the Ranee, to whom, consequently, he paid his rent.

The principal sudder ameen, after drawing up an account of all discoverable payments and receipts, of rent and revenue, between the appellant, the Ranee, and the collector, finds a balance due to appellant, from the Ranee and the farmer, of rupees 2,123-5-4; which sum he adjudges against them, in specified proportions. Lukhee Kanth Sein, the farmer's surety, is discharged from all liability.

In the above judgment, the plea of independent ownership on the part of the Ranee, is left altogether uninvestigated; as is that of the farmer, of having held his lease from her only. Neither the *pottah* nor *kuboolleut* have been produced; and with exception to certain acknowledgments, in the shape of official memoranda and receipts, obtained from the collector, which,—the estate being still in the names of the original purchasers,—are inconclusive as to the points at issue; there is no document to depend upon. The witnesses, of course, depose for their principals respectively.

I direct that the decision be cancelled; and the proceedings returned for revisal and disposal, after calling for the *pottah* and *kuboolleut*, and such other evidence as the parties may choose to file in support of their respective pleas.

The usual orders will issue in regard to stamps and costs.

THE 9TH MARCH 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 852 OF 1846.

IN the matter of the petition of Bhowanee Shunkur Bhutta-charje and others, filed in this Court on the 7th November 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of Hooghly, under date the 14th July 1846; affirming that of the moonsiff of Muhanaud, under date the 18th February 1846, in the case of Mudun Mohun Ghose, plaintiff, *versus* Bhowanee Shunkur Bhuttacharje and others, defendants.

In this case the plaintiff sued for possession of certain lands, transferred to him by a conditional sale, after having pursued the course prescribed in Regulation 17, 1806.

The petitioner appeared when the petition of notice was filed by the plaintiff under the above regulation; and protested, stating that he was the proprietor of the property, and that the sellers were his tenants. Again, when the present action was brought, the petitioner appeared before the moonsiff, and requested to be incorporated with the other defendants. This was refused by the moonsiff, under the Circular Order of the Sudder Dewanny Adawlut, dated 13th September 1843, (No. 33 vol. IV.) The principal

defendants did not appear ; and an *ex parte* decision, in favor of the plaintiff, was given by the moonsiff. The petitioner appealed, and the case came before Mr. James Reily, principal sudder ameen, who, after deputing an *ameen* to make local enquiries, decided that the petitioner, (appellant in his court) had no right or title in the property, and dismissed the appeal, affirming that of the moonsiff.

If the principal sudder ameen was of opinion, that the appellant was entitled to have his claim heard and tried in this case, he should have returned the proceedings to the moonsiff, with instructions to do so ; but, from the course he pursued, the appellant has been deprived of a decision on the merits of the case in the court of first instance. I therefore admit a special appeal ; and remand the proceedings to the principal sudder ameen, who will either dismiss the appeal without prejudice to the appellant's rights, should he desire to bring an action against the parties to this suit ; or, as stated above, if he be of opinion the appellant was entitled to have been admitted as a defendant in the moonsiff's court, in that case he will remand the proceedings to the moonsiff's court with instructions to act accordingly.

THE 9TH MARCH 1848.

PRESENT :

W. B. JACKSON, and

J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

E. CURRIE, ESQ.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 138 OF 1845.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Dacca, March 27th, 1845.

COLLECTOR OF DACCA, APPELLANT, (DEFENDANT,) *versus*

G. LAMB AND OTHERS, RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellant—Pursun Komar Thakur.

Wukeels of Respondents—Gholam Sufdur and A. Imlach.

CASE No. 155 OF 1845.

NUBKISHEN SIRCAR, APPELLANT,

versus

G. LAMB AND OTHERS, RESPONDENTS.

Wukeel of Appellant—Nilmoney Banerjee.

Wukeels of Respondents—A. Imlach and Sreenath Sein.

CASE No. 157 OF 1845.

GOLUCK CHUNDUR SEIN AND OTHERS, APPELLANTS,
versus

G. LAMB AND OTHERS, RESPONDENTS.

Wukeel of Appellants—Ramapurshad Rae.

Wukeels of Respondents—A. Imlach and Sreenath Sein.

CASE No. 159 OF 1845.

MUSST. HURSOONDREE AND OTHERS, APPELLANTS,
versus

G. LAMB AND OTHERS, RESPONDENTS.

Wukeels of Appellants—Rampran Rae and Bungsee Buddun Mitr.

Wukeels of Respondents—A. Imlach and Kishen Kishore Ghose.

CASE No. 160 OF 1845.

MUSST. GOURMUNNEE, APPELLANT,
versus

G. LAMB AND OTHERS, RESPONDENTS.

Wukeel of Appellant—Nilmoney Banerjee.

Wukeels of Respondents—A. Imlach and E. Colebrooke.

THIS was a suit instituted by the respondents against the several appellants and others, to recover the sum of Company's rupees 20,476-6-5 $\frac{1}{4}$ —viz. 14,170-15-10-3 principal, and 6,305-6-7 interest,—under the circumstances set forth in the plaint.

The particulars of the case are given in the following decree of the principal sudder ameen of Dacca.

‘Claim for the balance of a decree, detained by the collector for an illegal claim of Government revenue, rupees 20,476-6-5 $\frac{1}{4}$.

‘The history of the case is, that plaintiffs bought an estate at a public sale for arrears of revenue, and made a deposit of the purchase money with the collector. Some of the former incumbents objecting to the sale, on the ground that the allotment of their *jumma*, and the amount of their shares were distinct and separate, brought an action for the annulment of the sale, and the restoration of their interests. The zillah court agreeing with them, that though the land was held in joint tenancy, the *jumma* and shares had always been separate, decreed to the suitors six *annas* of the property. The purchasers relinquished the estate immediately after the decree was given, by presenting a petition to the collector to that effect; but the collector had appealed against the zillah decision, and he refused to admit the relinquishment.

The purchasers then sued for their money, which was decreed. The collector appealed against this also; but having lost the appeal preferred against the first case, he abandoned the latter; and the zillah decree for that case also became final. When plaintiffs executed their decree for the purchase money, the collector claimed the Government revenue of the estate, for the period between the date of plaintiffs relinquishment and the date on which the collector abandoned his appeal. The zillah judge disallowed the claim; but the collector preferred a summary appeal, and the Sudder Court over-ruled the judge's objections. The present action is brought by the purchasers to set aside that summary order, and to recover what the collector withheld, on the plea of his claim against them for Government revenue.

‘The points for adjudication appear to be—

‘*First.* Does the order, passed by the Sudder regarding the claim in question, bar the present action?

‘*Second.* Is the amount of revenue claimed by the collector, and adduced as a set off against plaintiff's decree, justly due by plaintiffs?

‘*Third.* Is it legal to carry the payments to the credit of the interest; or should they be passed first to the credit of the principal?

‘*Fourth.* Are any arrears of rent due from the other defendants; and are plaintiffs entitled to recover from them?

‘The *first* point to be considered is, whether the order passed by the Sudder, regarding the claim in question, bars the present action. It has always been a rule to regard every order, not passed in a regular suit, as miscellaneous; subject, if the parties please to make it so, to the test of a regular suit. The exceptions to the rule are given in the Circular Order dated 11th January 1839, and Construction No. 1129; but they amount simply to this, that no order regarding interest or *wasilaut*, or any other matter carrying out the intentions of the decree, can be made the subject of a regular suit. They cannot, therefore, apply to those instances where instead of carrying out the intentions of the decree, the order obstructs or nullifies the decree.

‘The claim, moreover, was adduced as a set off against the decree, at that stage of the case, when, on the principles that govern the admission of such pleas, it could not be allowed at all. The reasons are obvious:—*first*, because the claim was not due when plaintiffs' suit was instituted; *secondly*, because defendants could not, for that reason, give plaintiffs previous notice of their claim.

‘But that which principally impugns the summary proceedings, and renders it imperative to bring those proceedings to the test of a regular trial, is, that the only plea which could make the Government claim clearly binding on the plaintiffs,—viz. whether they continued to hold possession of the estate even after the relinquishment by petition,—was not enquired into, nor tried.

‘The proper course for the collector was, after the decree became final, to sue plaintiffs for the claim he had against them. As this was not done, it would be contrary both to law and usage to allow the summary proceedings to bar the present action.

‘The *second* point is, whether the amount of revenue claimed by the collector as a set off against plaintiffs’ decree, is justly due by plaintiffs. Plaintiffs contend that the amount is not due; that, as soon as the civil court had cancelled the sale of their estate, they immediately relinquished the property; and that the revenue claimed is for a period subsequent to the date of that relinquishment. The point to be decided then, is, whether the collector is entitled to the rent after plaintiffs had relinquished the estate. The collector we find sold the estate entire. The zillah court cancelled that sale, and decreed away 6 out of 16 *annas* of the estate; and the decree has become *final*. It is clear then, that the collector sold the estate to plaintiffs with a *defective title*; and with a defect not of a slight or trivial nature, but such as deprived the purchasers of nearly a moiety of the estate. The decree, moreover, *changed the nature of the property*. Plaintiffs bought the estate promising to themselves an exclusive right, and the sole mastership in the property. The decree destroyed these expectations: it thrust upon them co-shares not of their own choosing, and entailed upon them annoyances and litigations incident to joint undivided property. The decree also threatened plaintiffs with *an eventual action for wasilaut*, in the event of their retaining possession of the property. Why should they then expose themselves to an accountability which they had not calculated upon?

‘Whether, therefore, we consider the loss of 6 *annas* of the estate, the change in the nature of the tenure, or the unexpected accountability it entailed, it is clear that plaintiffs were perfectly entitled to relinquish the property, and more especially so, after a civil court had cancelled the sale; and if this be admitted, it is equally obvious, that, unless plaintiffs continued to hold possession of the estate, they were not responsible for the revenue due from it. The collector was required to prove this; but the Government pleader put in a petition declining to make a deposit of the *ameen’s* wages, which was required for that purpose. It must be assumed, therefore, that plaintiffs did not keep possession of the property, after they professed to abandon it by the petition they presented to the collector to that effect.

‘To these arguments the collector offers three objections:—*First*. That Section 27, Regulation 11, 1822, interdicts the return of the purchase money till a final judgment, regarding the sale, has been passed; that, by parity of reasoning, the purchaser was not at liberty to relinquish the property till that event had occurred. *Secondly*, that plaintiffs executed an *ikrar*, authorising a *surburakar* to collect the rents of the estate; and that that act deprives plain-

tiffs from preferring any claim against the collector or the Government. *Thirdly*, that, unless the amount of revenue is deducted from the purchase money, the State will have suffered an actual loss of so much money, with no prospect of its eventual realization.

‘*First*. But Section 27 was intended only to provide for the interest which might be claimed on the purchase money, for the period that the suit, regarding the sale of the property, might be pending in the civil courts; and it was with reference to that subject that the provision, regarding the detention of the purchase money till the final judgment was passed, was made. There is not a syllable in the section regarding the estate itself. It may, it is true, be urged, that, as the purchaser is not entitled to claim his money till a final judgment has been passed regarding the sale, so he cannot be entitled to relinquish the estate till that judgment has been given. But the inference does not necessarily follow from the premises. A person may be free to surrender his property, without being immediately at liberty to claim his purchase money. Be this as it may, there is obviously no positive specific enactment on the subject, which made it imperative on the purchaser to retain possession till the final judgment was pronounced. Under such circumstances, why should plaintiffs be held bound to have kept the property, and be made responsible for the revenue due for the period *subsequent* to their relinquishment? We have already seen, that it would be most unjust to insist upon their keeping the estate after the decree that cancelled the sale had passed; and no court of justice would adduce a law from vague and uncertain premises, and then apply that law, based upon deductions and inferences, in contravention of the principles of equity and justice. Something more palpable than a mere inference, would be necessary to legalize an act of gross injustice. But the plea in question could only have been urged when the action for the return of the purchase money was instituted. We find, indeed, that *it was pleaded then*, but overruled (see the collector’s answer as given in the zillah decree, dated 27th May 1836.) The plea, therefore, is not only inapplicable, but the time for pleading it has passed.

‘*Secondly*. That plaintiffs executed an *ikrar*. But the obvious import of the *ikrar*, taken together with the English petition presented to the collector on the subject, is, that the appointment of a *surburakar* (or manager) to collect the outstanding balances shall not effect the claims which either party may still be compelled to bring one against the other. It is absurd to plead this as a bar to the present claim.

Thirdly. That the revenues, unless recovered from plaintiffs, will be a loss to Government. But why was not the estate put up and sold as soon as the first arrears had accumulated against it?

Had this been done, which was the usual course, these heavy arrears would have been avoided. But the collector was afraid to sell, after one court had impugned the validity of the title to the estate; and if, from apprehension of further perplexity and difficulties, he departed from the course prescribed by law, and thereby entailed loss upon his employers, he can only blame himself for those losses, and should be willing to endure them. Again why did the collector neglect to attach the estate after plaintiffs had relinquished it? It was obviously his duty to do so; as there is no law which makes the landholder responsible for the revenue of his lands, *after he has abandoned possession*, for any period subsequent to his relinquishment. It is true, if he does not give due notice of having done so, he cannot justly be considered exonerated; but this is not the case in the present instance. The courts will not decree rents against a *shikamee talookdar* at the suit of his *zemin-dar*, unless it be proved that the *talookdar* has been in possession of the tenure. It appears, however, that part of the revenue deducted is for 1241. This must be allowed as the *istefa* was not made till 1242.

‘The point next for consideration, viz., the *third*, is, which of the modes of account is legal, that which carries the payments to the credit of the interest; or that which passes them first to the credit of the principal; or that which allows interest on both the debits and credits? Of these three modes, that of charging interest on both sides, the debits and credits separately, and taking the difference, is not known in the *mofussil*; and is confined, I believe, to mercantile transactions in Calcutta. That in which the payments are all carried first to the credit of the principal; and that in which the payments are carried first to the credit of the interest are both in use; but dependant, I believe, on the caprice of the creditor. It is important to decide which of these two methods is the proper one, as they make a remarkable difference in the results: the former leaving a balance against the collector of rupees 14,322-7-10, and the latter augmenting it to rupees 20,476-6-5½.

‘This difference arises simply from the payments in the one case being carried to the credit of the principal, which reduces the debt, and consequently reduces the amount on which the future interest would otherwise be calculated; whereas the other mode leaves the principal the same, and consequently continues to yield the same amount of interest as from the beginning. In neither case is there any interest upon interest charged; and the subject therefore does not come within the pale of Regulation 15, 1793, especially as that law applies only to cases in which money has been *advanced on loans*; and the present case is money deposited as the price of an estate, which has been forcibly withheld from plaintiffs, and withheld even after a court of justice had decreed that the money should be returned. The

point to be decided therefore, is, simply, whether the creditor is at liberty to carry the payments capriciously to either the principal or interest as he pleases? In sums advanced on loans, where the promise is to return the money with interest, it may be contended that the creditor must allow the debtor to choose the mode which will prove most advantageous to himself; unless, therefore, the payment is avowedly made as on account of the interest, the creditor, it may be said, cannot carry it to the credit of the interest. He must be held not to be at liberty to choose for himself, because the act is that of the debtor; and because the interest is not due till the day when the debtor finally settles his accounts.

‘ It may, on the contrary, be argued, that the creditor has the option of disposing of the payments in the way most advantageous to himself; as interest is but damages awarded for the loss occurring to the creditor from the withholdment of his money.

‘ In cases of sums advanced on loans, I should incline to the former opinion; but in cases where money was due, but forcibly withheld, I should incline to the latter. I am not aware of any fixed or determinate rules on the subject.

‘ But a late decision of the Sudder Dewanny Adawlut, given in Mr. Norris’s second number of suits decided in February 1845, (Munoruth Singh, appellant, *versus* Gyonchand Shah, respondent,) appears to recognize the principle of carrying payments to the credit of the interest. The senior judge of that Court declares, that ‘ it was established to the satisfaction of the lower court that the interest of the loan only had been liquidated, and the full amount of the principal was decreed with costs payable by appellant. I affirm the decree on the same grounds as those set forth, with the additional costs incurred, payable by appellant.’ Plaintiffs have also filed two precedents of the zillah court, shewing that accounts of interest made up in the same way have been decreed to claimants. With the agency houses in Calcutta, it is usual, I believe, when payments are made on constituted debts, at considerable distances of time, to calculate the interest to the date of each payment, to add to it the principal, and then subtract the payment from the amount. Looking therefore on the transaction between the parties as that of a forcible and unjust withholdment of plaintiffs’ property, I am of opinion that the plaintiffs were at liberty to pay themselves first for the loss they were sustaining of the interest of their money; and that their account, therefore, so far as it regards the mode of calculating the interest, is correct.

‘ The *fourth* point for consideration is, are any arrears of rent due from the other defendants, and are plaintiffs entitled to recover from them?—It appears that plaintiffs were led to sue these persons from the order passed by the Sudder Court. An *ameen* was therefore

deputed to ascertain the amount due from them. His account, though not incorrect, took in a period anterior to 1242,—the year when plaintiffs relinquished the estate,—and he debited them with interest for their arrears of rent. Both these features of his account appeared objectionable:—*first*, because the rent due for the period antecedent to plaintiffs' relinquishment was due to plaintiffs exclusively, and could not be carried to account against them; *secondly*, because these defendants plead that they were prepared to pay their rents, and that neither the plaintiffs nor the collector would receive them. It did not appear safe, nor necessary in such a case, to pronounce as to whether interest was recoverable from them. It is enough, in the present case, to ascertain whether any thing is due from them irrespective of interest. A *mohurrir* of the court was therefore deputed to make up another account, divested of these objectionable features; and that account gives the following sums against the following individuals:—

Names of those in possession.

1. Talook Mirtoonjuy } Sumboonath Sein, ... }	Golukchundur Sein } and others, }	86	5	5	3
2. Ranee Puddo Mookhee,	Ranee Puddo Mookhee,	4	3	7	3
3. Tarapurshad Raee, ...	Tarapurshad Raee, ...	2	11	2	2
4. Talook Radhakishore Ghose,	Gungadhur Ghose } and others, }	88	0	11	1
5. Talook Shamanund Ghose,	Hursoonduree,	395	6	7	7
6. Talook Ameer Omur Khan,	Omed Ali, Omur } Khan and others, }	60	2	1	3
7. Talook Golam Sunde,	Nufesakhatoon,	128	11	9	2
8. Nundlal Dut,	Nundlal Dut,	87	11	8	1
9. Talook Abdool Sobhan,	Gholam Muheeddeen and others, }	957	4	1	1
10. Nobokishto Sirkar, }	Nobokishto Sircar and his wife, Gungamonee,	77	4	11	1
11. Omakanth Banerjee,	Omakanth Banerjee and others, }	7,120	5	0	3

interest inclusive.

Rupees, 9,008 4 7 0

‘ Omed Ali, a proprietor of *talook* No. 6, filed an answer; but appointed no *wukeel*, and has offered no evidence.

‘ Ranee Puddo Mookhee, proprietor of *talook* No. 2; and Tarapurshad of No. 3, filed answers; but after the accounts were prepared, their *wukeels* admitted the accuracy of the accounts.

‘ Nundlal Dut filed no answer; but is present as *wukeel* for others, and admits the justice of the claim against himself.

‘Golukchundur Sein, a proprietor of *talook* No. 1, pleads that he has paid all that was due of his rents to the collector from 1239 to the 7th *Bhadur* 1244, previous arrears inclusive. But the collector’s *dakhila* proves, that on the 19th *Chey* 1244 he paid rupees 493-5-8½ : that of this sum rupees 377-9-3 is for rents of 1239, 1240, and 1241, and only rupees 115-12-5½ for the subsequent period. This, therefore, and rupees 82-7-8 paid on the 3^d *Assar* 1245, making rupees 198-4-1½, is all that can be carried to the credit of the present account. Deducting that sum from the rents due by defendants, it leaves a balance of rupees 86-6-5½ against them. Golukchundur contends, that when they got *wasilaut* from the auction purchasers, they got the difference after deducting the rents due by them ; and that that sum has not been allowed in the present account. But from the *roobukaree* of the additional principal sudder ameen, dated 26th *Assar* 1246, it appears that the *wasilaut* then allowed was for the period when plaintiffs were in possession ; but the present claim is not for that, but for a subsequent period, when plaintiffs were not in possession.

‘Chundrokishore Ghose, a proprietor of *talook* No. 4, contends that they were not in possession during the period in question ; that the *tuhseeldar* collected the rents. But he does not maintain that he ever abandoned his right and title to the property : he is therefore still responsible for the rents of the tenure ; and as all that exists at his credit in the collector’s records have been passed to his credit, and as he has no vouchers proving further payments, he has no just reason for complaint.

‘Hursoonduree, a proprietor of *talook* No. 5, contends that after deducting the money collected, through her husband and the *tuhseeldar*, the collector exhibited an arrear against her of rupees 531-8 ; and that she, in *Poos* 1244, paid that sum into the collector’s treasury. But it does not appear from the *dakhila* (dated 25th *Poos* 1246) that the payment was for a period subsequent to 1242. Nor does the copy of an account, said to be made at the collector’s office and filed in this case, avail her ; as she has no *dakhilas* beyond the one mentioned.

‘Nufeesakhatoon, a proprietor of *talook* No. 7, has not been able to prove any payments beyond those already credited in her account.

‘Gholam Muheeddeen, and others, proprietors of *talook* No. 9, plead that the collector had advertized their property for arrears due from 1239 to 1247 *Aghun*, and that it was sold on the 7th *Maugh* 1247 ; that the Government bought it, and has collected the rents through the *tuhseeldar* ; and that they have made a settlement with Kishtomohun Rae, who is in possession. But defendants do not state that any of these events occurred during the period for which their account has been made up, that is between 1242 and *Bhadur* 1244. Besides, defendants’ annual rent

is rupees 807-4-10½, and the advertisement shews an arrear of rupees 1,484-4-1½. This would make it appear that the balance from its amount could not include more than the rents of one or two years, that of 1245 and 1246 at furthest. But the present claim against defendants is from 1242 to 7th Bhadur 1244.

‘Nobokishto Sircar, a proprietor of *talook* No. 10, pleads that he was not in possession during the period for which the claim is made; that the auction purchasers and the *tuhseeldar* collected all the rents. But credit has been given for all that is upon the collector’s records; and the auction purchasers were not in possession from 1242 to Bhadur 1244, the period for which the claim is made. Nor has defendant any vouchers proving any payment in excess of the sums passed to his credit.

‘Omakanth Banerjee and others, proprietors of 6 *annas* of the estate itself, plead that they did not commence taking possession till the 7th Bhadur 1244, and have not even now obtained more than part possession of their property; that the collector has taken revenue from them subsequently to that date, and from the auction purchasers for the period anterior to that date; that the claim therefore is unfounded. But defendants, being proprietors of 6 *annas* of the estate, are obviously responsible for the Government revenue to the extent of their interests. This, by their own shewing, was paid by them, but deducted from money due to plaintiffs. Whether, therefore, it be true, or otherwise, that defendants did not get possession till the 7th Bhadur 1244, it is clear at least that plaintiffs were not in possession. The rents due from the *ryuts*, if not collected by defendants, are still in the hands of the *ryuts*. It was the collector’s duty to have attached the property, and to have collected these rents. He not only omitted to do this, but appealed against the *zillah* decree, and thereby barred the execution of that decree. If, therefore, defendants have claims for losses sustained in consequence of these measures, there can be no doubt that it is not from plaintiffs they can legally claim them. It being clear, however, that the Government revenue was due from defendants’ share of the property; that that revenue was taken from money due to plaintiffs, and that plaintiffs not being in possession could not have collected any thing from the *ryuts*, there can be no doubt that defendants are responsible to plaintiffs for the amount carried by Government to defendants’ credit. Defendants subsequently filed exhibits in the names of a few additional witnesses; but they were called upon for evidence by a *roobukaree* dated the 8th January 1845, more than two months and twenty days since, and the exhibits now filed were presented only to-day. It ought not perhaps to have been admitted into the file at this stage of the case.

‘The aggregate sum due from the *talookdars*, according to the *mohurrir*’s account, is rupees 9,008-4-7; and that due from the col-

lector is rupees 8,678-4-9½, making in all rupees 17,684-6-4-3½ due to plaintiffs.

‘It is necessary to note, that plaintiffs included the *talookdars* in the presentsuit for the reasons:—*first*, that the Sudder Court in their summary order had directed them to do so; *secondly*, that to have sued them, and omitted the collector, would virtually have amounted to an abandonment of their claim as founded on the previous decree, and to an admission that they continued to hold possession of the estate after their relinquishment of it, which would have been contrary to fact; *thirdly*, that the dilemma could only be avoided by suing them all together. The exception taken to the present action on this point was at the first hearing of the case finally disposed of (see *roobukaree* dated 22d June 1844); and defendants had the option given them of preferring an interlocutory appeal on the subject; but this neither the collector nor any of the *talookdars* attempted.

‘Plaintiffs’ claim is, therefore, thus decreed:—that the rents of 1241, and the interest, viz. rupees 2,792-0-1, be deducted, and the balance, rupees 17,684-6-4½, be paid to plaintiffs,—that is Sumboonath Sein and others shall separately pay as per account rupees 9,008-4-7, and the collector shall pay rupees 8,676-1-9½. If the other defendants fail to pay their dues, the collector shall pay the whole with proportionate costs, and interest on the principal from the date of plaint to this day, together with future interest on the aggregate amount from the day after decree to the date of payment. The rest of defendants be exonerated, and the collector pay their costs; and those of the defendants, who neglected to appear till the *ameen* had filed his accounts, shall pay three-fourths of their *wukeel’s* fees; one-fourth only payable by the collector. Let plaintiffs pay the costs of Rajchundur Poddar, and Ramnurain Poddar, and Ramlochun Ghose, whom they subsequently exempted from their claims; and those against whom decrees have been given pay their own costs.’

MR. JACKSON.—It appears that on the 9th May 1833, the collector of Dacca sold the estate for balance of Government revenue: it was bought by the plaintiffs, Mr. Lamb and another. Afterwards, on the suit of some of the former shareholders, the civil court, under date 21st April 1835, reversed the sale, and awarded 6 *annas* out of the estate to those shareholders. The plaintiffs then immediately, on 1st June of the same year, gave into the collector a petition relinquishing the estate, and sued in the court against the collector for a return of the purchase money. On the 27th May 1836, the plaintiffs got a decree for the purchase money, with interest, against the collector. The judge called on the collector, in execution of this decree, to pay up the money; but the collector deducted from it a sum due to Government on account of revenue,

for a period partly just before, and partly after the date on which the purchaser gave up the estate, in consequence of the reversal of the sale. The judge desired him to send the whole; but on an appeal to this Court, it was determined by a miscellaneous order of two judges, that the collector had a right to deduct the Government revenue. The present suit is brought to set aside that miscellaneous order, and to recover the portion of the purchase money, with interest, which has been withheld. The shareholders of the estate are included among the defendants, in consequence of the opinion expressed in the miscellaneous proceedings of this Court, that the plaintiffs' claim will lie against them.

On the 27th March 1845, the principal sudder ameen gave an award in favor of the plaintiffs, for the amount withheld on account of revenue for the period subsequent to the date on which they relinquished the estate. This award was partly against the owners of the estate in proportion to their shares in the first place; and, in the event of their not paying, against the collector for the whole. With regard to the claim for the sum withheld by the collector, on account of the period before the date of surrendering the estate, the principal sudder ameen was of opinion that the collector was competent to withhold it, and the plaintiffs' claim was rejected.

From this award the Government, and the other defendants, appeal in five different cases.

It appears to me, that the sale having been reversed, became absolutely void; that the purchasers were therefore entitled to receive back their money, with interest, as was declared by the court on their former suit. I do not think, that, after the reversal of the sale, the Government have any claim upon them for revenue, not even for the time they held possession; although, if they paid any during that time, they cannot claim a refund, but they are bound to account to the real owners for their collections, and any Government revenue paid by them would be allowed in their favor.

The Government, under the law, may realize their revenue from the estate, or from the actual owners. The collector therefore had no right to deduct any portion of the purchase money and interest due to plaintiffs under the former award of the zillah court, as the plaintiffs were not owners after the reversal of the sale. As the plaintiffs have not appealed, but have remained content with the partial award of the lower court in their favor, it need not be amended as regards the portion of their claim rejected.

The award against the other defendants, who are *shikumee talookdars* of the estate, is, however, erroneous. The principal sudder ameen declares them each liable in proportion to his share in the revenue of the estate. Some have not appealed, and it is

therefore unnecessary to interfere with the award against them. The following have appealed :—

Golukchundur Sein declared liable for,	Rs.	86	5	5	3
Hursoonduree,	,,	395	6	7	7
Nobokishto Sircar and another,	,,	77	4	11	1
	Rs.	559	0	0	0

They must be relieved of this liability; and the amount laid on the collector who will thus have to pay, ,, 559 0 0 0
and the sum awarded against him by the principal sudder ameen, viz., ,, 8,676 0 0 0

Total Rs. 9,235 0 0 0

with interest on that portion of which is principal.

Regarding costs, I agree in the order proposed by my colleagues.

MESSRS. HAWKINS AND CURRIE.—The parties now appealing are the collector of Dacca, and four of the *talookdars*, who have been made responsible for the aggregate sum of 559-0-4, according to their respective interests in the estate sold. The *talookdars* were made defendants in the cause, with reference to the opinion expressed in the orders of the Sudder Dewanny Adawlut, now sought to be set aside, to the effect that the parties holding the estate were responsible to the plaintiffs for the amount deducted from the purchase money by the collector.

In addition to the facts stated by the principal sudder ameen, it is only necessary to observe, that the estate *chukla* Ameerabad, &c., was sold by the collector of Dacca, on the 9th May 1833, and the sale was reversed by the zillah court, on the suit of the 6 *annas*' shareholders, on the 21st April 1835. The plaintiffs instituted their suit for recovery of the purchase money against the collector, on the 28th May 1835; and tendered their resignation of the purchase on the 1st June of the same year. The suit for refund of the purchase money was decided in favor of the plaintiffs, by the zillah court, on the 27th May 1836; and an appeal therefrom was immediately preferred by the collector, who had also appealed from the judgment of the zillah court of the 21st April 1835 reversing the sale, in which appeal he was not joined by the purchasers. The appeal from the decree of the 21st April 1835 was decided by the Sudder Court, in affirmation of the zillah judgment, on the 20th February 1837; and the appeal, in the second case, was then withdrawn by the collector, and struck off the file of the Sudder Court on the 12th September 1837. The miscellaneous orders of the Sudder Dewanny Adawlut, which it is now sought to reverse, were passed on the 4th July and 10th November 1838; and this suit was instituted on the 16th

December 1843, and decided by the principal sudder ameen on the 27th March 1845.

The legal points which present themselves for consideration in this case are:—*first*, whether, with reference to Construction 1129, the suit was admissible; and, *secondly*, whether the collector was justified in deducting from the amount of purchase money, the sum due on account of Government revenue for the period subsequent to the date of the relinquishment of the estate by the purchasers.

On the *first* point, we are clearly of opinion, with the principal sudder ameen, that the Construction 1129 is no bar to the action. The question of deduction of the Government revenue, from the amount payable under the decree of the 27th May 1836, was not involved in the decision, and this is quite sufficient to take the case out of the operation of the Construction cited.

In regard to the *second* point, it is necessary to refer more particularly to the part taken respectively by the collector and the purchasers, on the occasion of the reversal of the sale by the zillah court. The sale was reversed on the 21st April 1835. The collector appealed from the judgment of the zillah court, but the purchasers would not join in the appeal. On the 1st June 1835, or in very little more than a month after the date of reversal, the purchasers signified, in writing, to the collector their intention of abandoning the purchase.

Had the collector acted upon this, and allowed the decree of the zillah court to take immediate effect, there would have been an end of the matter, and he would have experienced little or no difficulty in realizing the balance due to Government: but, instead of this, he is the only party to appeal. His reasons for so doing, when the purchasers were willing to abandon the purchase, are not very obvious: he protracts the litigation for nearly two years, and is finally unsuccessful. We are not prepared to give our unqualified assent to the *dicta* of the principal sudder ameen, in regard to the demand of revenue from a zemindar after he has abandoned possession of his estate. But this is not an ordinary case of a zemindar relinquishing his estate. The plaintiffs purchased an estate at a sale for arrears of revenue; and the sale having been reversed by a court of justice, they at once relinquished their title and possession, and declined to prosecute the matter further. The responsibility of the purchasers would unquestionably have been extended, had they delayed to notify their intention to the collector; but in this respect they lost no time, on finding the collector appealing from the zillah decree of reversal. We cannot, therefore, consider them as personally accountable for the revenue after the reversal of the sale by a competent authority, and after their relinquishment of the purchase, consequent upon such reversal. This rules, that the collector was not justified in deducting from

the amount of purchase money the sum due on account of Government revenue, for the period subsequent to the date of the relinquishment of the estate by the purchasers.

We do not mean to say, by the foregoing remarks, that the collector had no right to appeal from the zillah decree. He unquestionably had : but he availed himself of his right on his own responsibility. He was in the end unsuccessful, and the purchasers are not to be visited with penalties for his error of judgment. Besides which, if he considered it his duty to prosecute the appeal, he had the means in his own hands of preventing the accumulation of revenue balances, by the attachment of the estate.

The only point then which remains for decision, is, the adjustment of the liabilities of the parties before the Court.

It is unnecessary to give any opinion, as to the liability of the purchasers for the Government revenue, during the period of their possession. From that part of the principal sudder ameen's decree which declares them liable, they have not appealed ; and the question therefore is not before the Court. Neither is any order necessary, in regard to the liabilities, under the principal sudder ameen's decree, of the *talookdars* who have not appealed.

In regard to the parties now before the Court, we observe, that the plaintiffs have not appealed from the decree of the principal sudder ameen, with the view of making the collector primarily responsible for the whole amount claimed by them. The collector has appealed, in order to obtain exemption from payment of the amount decreed against the Government ; and four of the *talookdars* have appealed, separately, with a view to obtain exemption from payment of the sums decreed against them respectively. Strictly speaking, therefore, the collector has not been called upon to shew cause in this Court, why the Government should not be charged with the sums declared by the decree of the lower court to be payable by the appealing *talookdars*. But the whole case, and the parties are before us ; and the prayer of the plaint is, that the miscellaneous orders of the Sudder Court, authorizing the collector to withhold a portion of the sum recoverable by the plaintiffs, on account of arrears of Government revenue, be set aside ; and the reversal of those orders is tantamount to an order requiring the Government to pay the whole amount recovered by the plaintiffs in their former suit, decided on the 27th May 1836, with the exception of such sum as the Court may now think proper to deduct from it. The objection, therefore, that the Government is not before the Court in regard to the sums ordered to be paid by the appealing *talookdars*, is purely technical ; and is not, under the circumstances, of such a nature as to prevent the Court going into the whole case. To this, it may be added, that the collector has himself brought this part of the case before the Court in his petition of appeal, in his objection to that part of the principal sudder

ameen's decree which declares the Government chargeable with the whole amount, if the plaintiffs cannot recover from the other defendants.

We are of opinion, then, that the appealing *talookdars* cannot be held as primarily responsible to the purchasers, whose claim is against the Government, the party to whom they paid the amount of purchase money.

The collector has, in his appeal, taken objection to the mode of calculating interest adopted by the plaintiffs, and recognized by the lower court. But the mode of deducting payments first from the interest, and then from the principal, is common, and has been repeatedly recognized by this Court.

The collector further urges, that under Clause 1, Section 27, Regulation 11, 1822, the purchasers are not entitled to recover interest at all. But we are precluded from entering into this point, which was disposed of by the decree of the 27th May 1836, the appeal from which was withdrawn by the collector himself. We are not dealing with the question of interest upon a deposit made in the collector's office by a purchaser; but with the question of interest upon money due under a decree of court, the payment of which has been withheld by the collector.

We dispose of the case as follows, modifying, in some respects, the decree of the principal sudder ameen.

So much of the decree of the principal sudder ameen, as declares the sum of Company's rupees 8,676-1-9½ out of the claim to be payable by the Government, is affirmed.

The sum of Company's rupees 559-0-4 declared payable by the undermentioned appealing *talookdars* to be paid by the Government.

Nobokishto Sircar and another,	77	4	11	1
Golukchundur Sein and others,	86	5	5	3
Musst. Hursoonduree and others,	395	6	7	7

Company's rupees, . . 559 0 4 0

The amount of the original claim thus decreed against the Government is 9,235-2-1½; of which, taking it in proportion to the whole claim, the sum of 7,400 is principal, and 1,835-2-1½ interest.

Interest on the principal sum of 7,400 rupees, for which the Government is thus made responsible, will be charged from the date of institution of suit to the date of the principal sudder ameen's decree,—that is, from the 16th December 1843 to the 27th March 1845.

The amount decreed of the sum sued for, and the interest on the principal being consolidated, interest will be charged on the aggregate sum from the date of the zillah decree to the date of payment.

With respect to costs, the Government will pay the costs of the plaintiffs in the lower court, with exception of the portion rateably assignable to the 2,792 rupees disallowed out of the claim by the principal sudder ameen, and in this court upon the appeal of the collector. The Government will also be charged with its own costs in both courts.

With respect to the *talookdars*, we observe that they could not have been called upon to pay at a rate higher than the *jumma* of their respective *talooks*, consequently their interests must have been known, and they might have defended to the extent of them. If they have gone beyond this, and paid their pleaders full fees upon the whole amount of suit, the Government cannot be charged with these. The Government then will be charged with the costs of the appealing *talookdars* in both courts, in proportion to their respective interests in the case.

The plaintiffs have replied separately to the appeals of the *talookdars*, and their pleaders have applied for full costs on each appeal. This cannot be admitted. The *talookdars* appealed in order to procure exemption from payment of the sums decreed against them; and it was perfectly immaterial to the plaintiffs whether they were exempted or not; as, in the event of their not paying, the Government was, by the principal sudder ameen's decree, chargeable with the whole amount. It would have been quite sufficient for the plaintiffs to have stated in their reply to the collector's appeal, that it was not necessary for them to reply separately to the other appeals. If they have gone beyond this, and incurred further expense, it must be at their own risk, and they must pay their own expenses on the appeals of the *talookdars*.

THE 9TH MARCH 1848.

PRESENT:

W. B. JACKSON, and
J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

E. CURRIE, ESQ.,

EXERCISING THE POWERS OF A JUDGE.

CASE No 186 OF 1846.

*Regular Appeal from a decision passed by Mr. C. Mackay, Principal
Sudder Ameen of Mymensingh, January 26th, 1846.*

RAMKOOMAR CHUKERBUTTY, APPELLANT, (PLAINTIFF,)

versus

TARA MUNNEE DIBEEA AND OTHERS, HEIRS OF BRIJ
KISHWUR, DECEASED, BHYRUB CHUNDUR CHOW-
DHREE, GOOROOPURSHAD MITR WUKEEL, AND PUD-
DUM LOCHUN, TREASURER, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Govind Chundur Mookerjee.

Wukeel of Respondents—Gholam Sufdur.

CLAIM rupees 6,110, principal and interest, under a decree of court in favor of Ramkoomar against Bhyrub Chundur, realized by Brij Kishwur.

The principal sudder ameen recorded the circumstances of the case, and his decision on the 26th January 1846, as follows:—

‘This is a claim for rupees 6,110, 2 annas, 8 gundahs, 12 krants, under the following circumstances. The plaintiff states, that he had obtained a decree for rupees 2,693, 2 annas, 2 gundahs, against Bhyrub Chundur Chowdhree, which amount his uncle, Brij Kishwur, through the agency of Gooroopurshad Mitr, (a wukeel of the dewanny court) obtained partly from the treasury of the civil court, and partly privately from the defendant of the former decree, and have appropriated to their own use: hence this suit to recover the same, with interest, from the defendants above named, as well as the treasurer of the court.

‘Only one defendant, Eshan Chundur, (the mutmunna of Brij Kishwur) has defended the suit. In his answer, he states, that the amount of the decree in question the plaintiff had himself received, through his pleader, Gooroopurshad Mitr; and that his father had nothing to say to it. He also states, that his father was entitled to half the amount of the decree; but that he only obtained rupees 96, 8 annas, 2 gundahs, 2 cowries, under a private arrangement between himself and Bhyrub Chundur Chowdhree; and which amount the plaintiff could not legally recover from the heirs of the said Brij Kishwur.

‘The point for decision is :—was the plaintiff of this suit the decreeholder of the one in dispute ; and, if so, did he himself obtain the amount realized in execution of that decree from the deposit in the civil court, or was it otherwise, *i. e.* did the defendants draw it from the treasury, and appropriate it to their own use ?

‘Beyond the simple acknowledgment of Brij Kishwur, as shewn in the copy of the *roobukaree* of the former principal sudder ameen, dated the 13th September 1836, to the receipt by him (*awpus*) of rupees 96, 8 *annas*, 2 *gundahs*, 3 *cowries*, the plaintiff has furnished no proofs to shew that he appropriated the rupees 2,767, 10 *annas*, 2 *gundahs*, which was in deposit in the civil court on account of the decree held by the present plaintiff, in the suit in which Bhyrub Chundur Chowdhree was defendant ; whilst from the receipt filed in this suit, under the signature of Gooroorpurshad Mitr, a *wukeel* of the *dewanny* court,—and whom the plaintiff himself personally appointed, by *mookhtarnamah*, to act for him in the said case and who, though present, has not defended the suit,—there is not the smallest doubt that he, the said Gooroorpurshad, received the amount in deposit from the civil court ; and as he has not shewn how he appropriated the same, or that he had paid the amount to his then client, I consider him clearly liable for the amount of the receipt, which bears his signature. The court thinks it necessary here to state, that, during the trial of this case, it called upon the said Gooroorpurshad Mitr, *wukeel*, to state to whom he paid the amount obtained from the treasury of the civil court. His reply was, that ‘he could not say who took the money ; but that he signed the receipt, on which the amount was taken out of court, on the direction of Brij Kishwur.’ But that *this statement* was false, I easily ascertained by a reference to the *khuzanchee’s* book of deposit ; and it there appeared that *he himself* was the drawer thereof, and that the book bore his signature.

‘Under the above circumstances, I would adjudge that the plaintiff receive rupees 96, 8 *annas*, 2 *gundahs*, 3 *cowries*, with interest to that amount, from the defendants, the heirs of Brij Kishwur, deceased ; and that from the defendant, Gooroorpurshad, *wukeel*, he received rupees 2,767, 10 *annas*, 2 *gundahs*, with interest also equal to that amount ; as well as interest on the foregoing amounts from the above defendants from date of this decree, together with costs and interest on the same from this date. The remaining defendants to be considered exempt from this decree.

‘Order accordingly, that a decree, as above, pass in favor of the plaintiff.’

From this decision the plaintiff appealed, claiming an award generally against all the defendants. It appears from the papers of the case, that, in execution of the decree in favor of the Ramkoomar, the sum of rupees 2,767 was deposited in court by

Bhyrub Chundur, the party cast. This money was paid over by the treasurer, Puddum Lochun, to the *wukeel*, Gooroorpurshad under an order of court. There is no positive proof that Gooroorpurshad paid it to any one: neither the treasurer nor the *wukeel* appear in this case. The *wukalutnamah*, under which the *wukeel* received the money, is denied by Ramkoomar, the decreeholder, whose signature it purports to bear; and there is no record on the face of it, to shew that the execution of that document was ever proved.

It is plain, therefore, that the *wukeel* is liable for the amount; but it is further shewn, that, after the payment of the sum of rupees 2,767 abovementioned, the defendant, Brij Kishwur, realized rupees 96 in execution of the same decree; and that this was paid to him in consequence of an order of the principal sudder ameen, dated the 22d August 1836, passed on a petition of Ramkoomar denying the authority under which the rupees 2,767 had been drawn on his account, and requesting payment of it, and of the balance still due from Bhyrub Chundur. This order was to the effect, that 'it appeared Brij Kishwur had been all along executing the decree, and had received the money paid in satisfaction of it; that, therefore, he, Brij Kishwur, might recover the remainder.' No objection was made to this at the time by Brij Kishwur, who was himself a *wukeel* of the Court; but, on the contrary, it would appear that he continued afterwards to act upon this order, and received a further sum of 96 rupees, as above detailed, on the same account. This he admits himself.

It seems, therefore, that Brij Kishwur had been all along carrying this decree, in favor of his nephew Ramkoomar, into execution, for which he had some excuse on the fact that he claimed a joint right to the property under litigation. The money, however, was not due to him, but to Ramkoomar only; and he is bound to refund the whole sum which he received. That he meddled with a decree in favor of another is proved, and that he received some portion of the sum due under it; and further, there is strong ground for believing that the remainder, or rupees 2,767, was, as stated by the principal sudder ameen in his proceeding, actually realized by him also. His allowing the proceeding to remain on record, without attempting to deny the truth of the statement, appears to shew that he admitted the correctness of it: in fact, it is most probable, that the principal sudder ameen ascertained the fact at the time of recording his order.

We, therefore, amend the principal sudder ameen's order, and award the full sum claimed, with interest and costs, against the defendants, Brij Kishwur's heirs, and the *wukeel*, Gooroorpurshad, jointly and severally. The other defendants, Bhyrub Chundur and Puddum Lochun, are not liable.

We further observe, that the *wukeel*, Gooroorpurshad, has acted in a dishonest manner; that he filed a *wukalutnamah* on the part of Ramkoomar which is denied by Ramkoomar; that he realized money under it, and did not pay the money to the said Ramkoomar. He is, therefore, unfit to practice as a *wukeel* of court. We direct that his name be immediately struck off the list of *wukeels*.

THE 9TH MARCH 1848.

PRESENT:

W. B. JACKSON and
J. A. F. HAWKINS, ESQRS.,
TEMPORARY JUDGES.
E. CURRIE, ESQ.

EXERCISING THE POWERS OF A JUDGE.

CASE No. 247 OF 1846.

*Regular Appeal from a decision passed by A. Sconce, Esq. Judge
of Backergunge, August 25th, 1846.*

COLLECTOR OF BACKERGUNGE, APPELLANT,
(DEFENDANT,)

versus

INDURMUNNEE CHOWDHRAIN, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Thakur.

Wukeel of Respondent—Ramapurshad Rae.

CASE No. 261 OF 1846.

*Regular Appeal from a decision passed by A. Sconce, Esq., Judge
of Backergunge, August 25th, 1846.*

KUBEEROODEEN MOHUMMUD AND ANOTHER,
APPELLANTS, (DEFENDANTS,)

versus

INDURMUNNEE CHOWDHRAIN, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellants—Gholam Sufdur.

Wukeel of Respondent—J. G. Waller.

CLAIM for possession of 1 anna 6 g. 2 c. 2 k. share of 7 gundas zemindaree *pergunnah* Suleemabad, &c.; and reversal of the sale of the same for arrears of Government revenue.

The plaintiff claimed reversal of a revenue sale of the above-mentioned estate, on the ground that the conditions laid down in Regulation 11, 1822, had not been properly observed. The defendants denied the existence of any defects in the sale proceedings.

On the 25th August 1846, the judge of Backergunge reversed the sale, by his decree which follows:—

Suit to reverse the sale of an estate sold for arrears of revenue. The plea was that the estate was sold for a demand in excess of what was due notwithstanding tender of the balance before proceeding to sale.

Judgment of lower court in favor of plaintiff affirmed and sale set aside on the suit of one only of the owners.

Payment by the civil court of the debts of a co-sharer's.

Plaintiff, representative of the deceased Muddun Nurain Rae, proprietor to the extent of a 1 *anna*, 6 *gundahs*, 2 *couries* and 2 *krants*' share of an estate, described as a 7 *gundahs*' share of *pergunnah* Suleemabad, sues to quash the sale of that estate, which took effect for arrears of revenue on the 4th May 1840. Plaintiff states, that, up to the day of sale, the advertized arrear amounted to rupees 246-6-4, besides 1 rupee as interest; that two agents, Ramsagur and Kalee Purshad, were in attendance, and were prepared to pay that sum. That Nitaye Churn, *touzee nuvees* of the collector's office, (a defendant) in collusion with Kubeeroodeen Mohummud, in order to effect a sale of the estate, raised the balance to rupees 345-6-4, and laid an account, so struck, before the deputy collector, who was about to conduct the sale; that the deputy collector gave the zemindars' agents respite till the evening, to make up a balance, which exceeded their expectations; and that not waiting for the expiry of the stipulated period, and before the return of the *mookhtar* who had gone for the money demanded, the sale was begun for a balance, as certified in the sale *roobukaree*, of rupees 288-0-11 (even that, it is observed, exceeding the advertized balance); and that Kubeeroodeen Mohummud, *sherishtadar* of the civil court, having an understanding with Gopal Kishen, a co-proprietor in the estate, (whose son is a defendant) put forward his son, Mohummud Ahsun, to bid; and that the estate, worth 60,000 rupees, was knocked down to him for rupees 12,000.

Plaintiff further states, that the same day, before the *bynah*, or instalment of the purchase money, had been paid, the *mookhtars* attended, and delivered rupees 345-6-4, the full sum which had been originally demanded; that they, at the same time, presented a petition, requiring rupees 98, which they considered an exaction over and above the advertized balance, to be refunded to them. That the day then closing, no order was passed upon this application; that next day the deputy collector did not attend *kutcherry*; but that on the 6th May, that officer, though he might have discovered the irregularity which had occurred, and might have procured the reversal of the sale, (knowing as he did that the money lodged on the part of the defaulters had been paid by his own desire) merely ordered the petition to be forwarded for the consideration of the commissioner, with the account sales.

Plaintiff's main plea rests, it will be observed, in an error of account, and on a surcharge: and, in answer to this plea, the collector and the defendants, Kubeeroodeen and Mohummud Ahsun,—denying the correctness of the narrative which plaintiff has given of the events said by her to have occurred during the day of sale,—maintain the correctness of the accounts upon which the sale was founded.

‘ In appeal to the commissioner against the sale, Muddun Nurain (husband of plaintiff) was understood to object that Mohummud Ahsun was a *benamee* purchaser, and that Gopal Kishen, one of the defaulters, had, under cloak of Mohummud Ahsun’s name, recovered (in whole or in part) the estate. But, in this suit, tho’ Gopal Kishen’s son is made a defendant, and tho’ it is attempted to be proved by witnesses that the irregularities which plaintiff complains of were committed with his co-operation, plaintiff’s *wukeels* distinctly admit that they are not prepared to show that Nubkishto, as heir of Gopal Kishen, retains any interest in the estate ; and the *benamee* plea, with respect to him, may be said to be withdrawn. Nor can I attach more weight to a similar allegation, with respect to the defendant Kubeerooddeen Mohummud. This objection was not urged to the revenue authorities. Plaintiff cannot be said to have suffered by the dereliction of any legal principle, even if it be admitted that Kubeerooddeen holds an estate which his son bought ; and the common interest subsisting between father and son, I think, protects the defendants against the imputation of the surreptitious substitution of a nominal purchaser, which the sale law of 1822 unquestionably prohibited. Lastly, it has been urged, that the sale of the estate within one month of the date of the notice of sale, being published in the *mofussil*, renders the sale invalid ; and, in support of this plea, plaintiff refers to sections 5 and 6, Regulation 7 of 1830. But it is to be observed, Regulation 7 of 1830 provides not for the *mofussil* but for the *sudder* notices of sales,—that is, for the advertizement issuable in the collector’s own office and in that of the judge. While Clause 4, Section 7, Regulation 11 of 1822, continued to constitute the rule for the service of notices in the *mofussil*, rendering a period of *twenty days* a sufficient service ; whereas, in the present instance, plaintiff admits the period to have extended to twenty-three days.

‘ I return then to the consideration of the main issue, viz., the balance demanded on the day of sale, by default of which the estate was sold. In the sale proceedings, bearing date 4th May 1840, the balance then due (comprising arrears advertized as well as arrears not advertized) is stated to be rupees 288-0-11 ; and to consist of the following particulars :—

Balance of the <i>kists</i> of January and February, advertized 1st April,	Rs. 246	6	4
Interest on ditto,	1	0	0
	Rs. 247	6	4
<i>Kist</i> of March (unadvertized,)	14	0	6
Ditto of May to day of sale,	6	11	3
Interest,	19	14	10
	288	0	11

‘ I have then to consider :—*first*, the assertion of plaintiff, that, in rejection or in substitution of the balance advertized and actually due, the defaulting zemindars were called upon to pay rupees 345-6-4 ; and, *secondly*, if the account entered in the sale proceedings be adopted, whether the defaulters’ liability to pay rupees 288-0-11 was legally set forth.

‘ There is no dispute now between the parties that the advertized balance of rupees 247-6-4 alone warranted the sale. If that sum had been paid, the necessity and the justification of proceeding to a sale would alike have ceased. But, for the reasons following, I think plaintiff has made good her point, that, at the time of sale, not the payment of the actual balance of rupees 247-6-4, but of the overcharged, not due, balance of rupees 345-6-4, was made the condition of the postponement of the sale.

‘ In the *lotbundee*, or tabular statement, in which particulars of estates advertized for sale are entered, it is clear that the balance exhibited, originally, was rupees 345, with or without a fraction in *annas* and *pie* ; but the figures, of rupees 345, have been written over and converted into rupees 246. *When* this was done, before or after the sale, there is no evidence on the face of the document. But *how* the balance of rupees 345 happened to be struck may be thus accounted for. In the advertizement when first issued, the total balance at the date of the advertizement (that is, 1st April) was shewn to be rupees 454-2-2, principal revenue. Afterwards, in anticipation of the sale, it became necessary to deduct any intermediate payments. Accordingly, two separate payments, of rupees 98 and rupees 109-11-10, having been made by the zemindars on the 8th April, a corresponding deduction had to be made from the advertized balance. It appears, therefore, that omitting, in the first instance, the item of rupees 98, only the sum of rupees 109 was deducted from the advertized balance of rupees 454-2-2, leaving rupees 345 apparently due ; and, afterwards, (I say not, with respect to the appearance of the original *lotbundee* which I am now considering, how long afterwards) that the item of rupees 98 was introduced above the other, and a new balance struck.

‘ Further, at the request of plaintiff, I required the collector to send for my inspection the book in which *bids* were entered, as the sale went on. This is a rough sort of note book, kept by the *nazir* of the collectorship. It wants the authority of a formal record formally attested. But if its genuineness be otherwise susceptible of proof, it may be permitted to vouch for the fact, or facts, of which it was intended to be a contemporary *bond fide* record. I find then in this book, that the sale of the estate is recorded,—the balance for which the estate was sold is said to be rupees 345-6-4,—the bids of the different bidders are entered,—and, finally, the closing of the sale in favor of Mohummud Ahsun

for rupees 12,000. These entries have been sworn to by the man, who at the time of the sale wrote them, the present acting *nazir* of the collectorship, who then assisted the *nazir* as a *bukshee*. A *bukshee* is not a public officer: it may, or may not, be expedient to accept the services, and recognise the situation of a person who does not receive any public emolument; but I think there is no doubt whatever, that the *bukshee*, on the occasion to which I now allude, took the place of the *nazir*, and that the notes of the sale taken by him formed a *bonâ fide* sketch of the proceedings. This man further states, that, to the best of his belief, the balance of rupees 345-6-4 was taken by him from the *lotbundee* above alluded to.

‘ Lastly, what taken in connexion with the above two particulars fully corroborates the assertion of plaintiff, with respect to the demand of rupees 345-6-4, is a *roobukaree* drawn up by the deputy collector, on the 6th May, on the subject of the petition spoken of in the plaint as being presented by the agents of the defaulting zemindars. The *roobukaree* embodies the statements of the petition. It records the assertions of the petitioners to be, that the balance, for the realization of which the sale was advertized, did not exceed rupees 247-6-4; that Nitaynund Muzoomdar, *towzee nuwees*, contrary to the terms of the advertizement, made out a claim for rupees 345-6-4; that they were unable to meet this overcharge; and that not paying in the net demand of rupees 247-6-4, the estate had been sold for rupees 12,000. Nevertheless, it was added, they had lodged, on the same day, the whole sum of rupees 345-6-4 as ordered, with the treasurer. The deputy collector, in the *roobukaree*, makes no denial, and seems to admit the truth of these statements. He merely remarks, that as the *muhal* had been sold, and the *bynah* (instalment in the way of earnest) had been paid, the revenue could not now be taken; but he observes, the money (that is, the rupees 345-6-4) may be left *bynah amanut*; and the petition will be sent with the account sales to the commissioner. The expression, *bynah amanut*, was, of course, an oversight. It meant that the money should not be formally credited; but left, without being brought to any particular account, in the hands of the treasurer. It is not clear from the wording of the order, whether the rupees 345-6-4 from the 6th May (and not before) was to be delivered to the treasurer; or whether, (as in the body of the petition the money was expressly stated to have been lodged with the treasurer on the 4th May by the deputy collector’s order) he permitted the custody of the money to be so *continued* till further orders. But I cannot come to any other conclusion than that the deputy collector assented to the version, given by the petitioners, of the occurrences preceding the sale. It is inconceivable, I think, that they should have brought rupees 345, unless they had been called upon

to pay that sum. It is expressly stated in the petition, that they were prepared to pay rupees 247-6-4; but that they were balked in liquidating the balance due, owing to a call being made upon them for rupees 98, over and above the advertized balance. Obviously the petition speaks of facts of which the deputy collector was cognizant; and its presentation, and tacit reception, seem to me to be irreconcilable with any other supposition than that the deputy collector assented to the facts which it described: and it will be observed, that the sum which the petitioners spoke of as being overcharged, namely, rupees 98, tallies exactly with the sum, the realization of which appears on the face of the record to have been originally omitted from the '*lotbundee*.'

'The same point plaintiff has endeavoured to establish by several witnesses; but I must say, were it not for the documentary evidence, just described, I should much doubt whether the statements of these men were to be relied on.

'Believing then the plea to be proved, that the sale was forced on for an arrear which was *not* due, and part of which had been nearly a month before actually paid, it is of less consequence to discuss the arrear of rupees 288-0-11, assumed in the sale proceedings to have been the sum for which the sale took effect. Obviously between the exaction of rupees 345-6-4 and the preparation of the *roobukaree* of sale, the *mistake* of demanding rupees 98 over much, had been discovered. When, and under what circumstances, the discovery was made, there is no evidence to shew; but it is clear to me that it was intimated to the defaulting zemindars, that the payment of nothing short of rupees 345 could stop the sale; and, therefore, I think, that nothing short of quashing the sale will afford them adequate redress. The item of rupees 288-0-11 includes, as already shewn, the unadvertized balances of March and May, with additional interest; and though the manner in which these items are spoken of, as forming portion of the arrear which justified the sale, may be objectionable, I think the intention was merely to exhibit the whole arrears which would have to be recovered from the purchase money. It would appear to be an error indeed, to charge the defaulting zemindars with any portion of the revenue of the month of May: for, by Section 22, Regulation 11 of 1822, the purchaser became answerable for the entire *kist* of that month; but whatever right the former might have had to resist the payment of rupees 6-11-3 out of the surplus purchase money, I do not think the exhibition of this claim, on the part of the collector, can be said to have led to the sale itself.

'I therefore quash the sale. The defendants, Kubeerodeen and Mohummud Ahsun, must account to the proprietors of the estate for *mesne* profits, with interest from the date on which the amount may be ascertained. The purchase money must be restored; and as it appears by a report received from the col-

lector, that, besides rupees 416-15-4 charged on account of arrears of revenue, rupees 3,989-13-8 has been paid by requisition of the civil courts in execution of decrees held against certain of the proprietors, the proprietors recovering the estates under this decree must be held answerable for the repayment of that sum.

‘Government must pay the entire costs of the suit, together with interest on the purchase money till the date of repayment: only from this day the proprietors themselves shall be answerable for interest on the sum of rupees 3,989-13-8. In determining the liabilities of the parties on these points, I have followed the decision passed on the appeal of Udman Sing and others, reported in page 358, volume V, of the cases determined by the Sudder Dewanny Adawlut.’

MR. JACKSON.—From this decision two separate appeals have been brought by the two defendants, urging the insufficiency of the reasons assigned by the judge for considering the sale invalid. There appears to be no dispute regarding the time of notice: an objection raised on this ground, before the judge, was thrown out by him, and was in fact untenable. It is not taken up again in appeal.

The main defect pointed out, is, that the estate was sold for a balance which was not due,—that is, that the balance was stated at a sum larger than the real balance.

The notice (*ishtehar*) was issued on the 1st April for a balance of rupees 454. On the 8th April the zemindars paid in two sums, viz. rupees 98 and 109-207. There remained due at the time of sale, therefore, only Rs. 247.

The judge considers it proved, that the estate was actually sold for 345 rupees, the sum of rupees 98 not having been credited to the plaintiff. In support of which he relies chiefly on a book kept by the *nazir's bukshee*, shewing the number and amount of the bids made at the sale, and upon certain depositions. On looking at the *lotbundee*, I find that both the sums,—rupees 109 and rupees 98,—are duly credited. It is, however, stated underneath, that the total amount due is قلم زده (scratched or altered): this appears to me immaterial. There are certain conditions laid down in Section 5, Regulation 11, 1822, which are necessary to legalize a sale. The only condition among them, upon which this sale is questioned, is the 3d, viz. that due notice of the demand was not given, inasmuch as the demand was erroneously stated, and differed from the demand for which the sale took place. Even admitting that the sum of rupees 345 was erroneously stated at the time of sale, as the amount for which the sale would take place, there is no sufficient reason to reverse the sale. The notice was perfectly correct as to the amount; and, by condition four of the abovementioned section, if *any portion* of the balance mentioned in the notice remained due at the time

of sale, the sale cannot be set aside. It is not even contended that some portion, in fact the greater portion of the balance mentioned in the advertizement, was still unpaid, and actually due at the time the sale took place.

The plaintiff asserts, that, on the very day of sale, he tendered the amount of balance really due, viz. rupees 247 to the collector ; but that he refused to accept it, saying plaintiff must pay rupees 345, in order to stay the sale. Now, I consider the absolute refusal of the collector not proved. I believe the money was tendered, but conditionally ; and when the collector refused to stay the sale, it was withdrawn. In fact, had the defaulter tendered the money unconditionally, the collector could have no reason whatever for refusing to accept it: and the fact that it was not paid in, is, to my mind, sufficient proof that it was not tendered unconditionally. It is to be observed, that on the occasion of a dispute as to the amount of balance, the defaulter should, if he wish to stay the sale, deposit the full amount of the collector's demand, under protest as directed in Section 10, Regulation 11, 1822. This was not done ; and the collector therefore acted according to law in selling. Still, if the lesser sum, which was actually due, had been paid, or even offered unconditionally, the sale must have been set aside by a court of justice.

I do not consider that the balance was either paid or tendered unconditionally ; and I would therefore reverse the judge's decision, and uphold the sale.

MESSRS. HAWKINS AND CURRIE.—The case turns entirely upon the alleged facts, that, at the time of sale, the proprietor's agents were prepared to pay the amount remaining due of the advertized balance, and were prevented doing so by the demand of a larger sum.

That the larger sum was really demanded, appears to be clearly established. In the original *lotbundee* examined by the judge, the remanent balance, for which the sale was to be made, appears to have been first entered as rupees 345-6-4. It is evident from the petition of the agents, and the *roobukaree* of the deputy collector, dated 6th May 1840, that that sum was actually paid in after the sale ; and there is no apparent reason (as justly observed by the judge) why such a sum, being in excess of the real balance, should have been paid unless it had been demanded as stated in the petition. The evidence of the acting *nazir*, and the rough book of bids sworn to by him, also go to shew that the balance demanded, when the estate was put up for sale, was rupees 345-6-4.

An erroneous demand would not, in itself, be sufficient to invalidate the sale ; but the established fact that such demand was made, supports the other allegation of the plaintiff, that the pro-

prietor's agents were prepared to pay the balance really due (rupees 247-6-4); and were prevented doing so. The only direct and positive evidence, of the real balance having been tendered, is to be found in the depositions of the witnesses summoned by the plaintiff. They are in accordance, however, with the statement made at the time by the proprietor's agents, which is embodied in the *roobukaree* of the deputy collector of the 6th May, and not controverted by him. From this statement, it is apparent, that the whole sum demanded was lodged in the collectorate on the evening of the day of sale; and as it is admitted (being so stated in the sale *roobukaree*) that the agents were present during the day, it is unreasonable to suppose that being able to produce the larger sum, unexpectedly demanded, at four or five o'clock, they should not have been prepared with the smaller sum, which they knew they would have to pay, two or three hours earlier. It is to be noticed, that neither of the reports furnished from the collector's office on the appeal of the proprietors, first to the commissioner and then to the Sudder Board, were prepared by the same officer, who held the sale and wrote the *roobukaree* of the 6th May.

We consider it then to be proved:—*first*, that the estate was sold for an alleged balance of rupees 345-6-4, the balance actually due being only rupees 247-6-4; *secondly*, that the proprietor's agents were in attendance before, and at the time of sale with the actual balance; and that payment of that balance was tendered, but not received, a larger sum being demanded as the condition of staying the sale.

Under these circumstances, we are of opinion, that the sale was made in contravention of the fourth condition of Section 5, Regulation 11 of 1822. After tender of the actual advertized balance, the estate could not legally be sold for the realization of such tendered balance. For, although a tender of payment made within the prescribed time, does not absolve the obliger from the payment of the sum due by him, it discharges him from the penal consequences resulting from the non-fulfilment of his obligation. In point of fact, the sale was made for the recovery of the excess demand; no part of which was legally claimable.

The only other point on which it has been attempted to impugn the decision of the zillah judge, which we consider it necessary to notice, is that of the appropriation of part of the proceeds of sale to the payment of the debts of some of the other shareholders. The case of *Bustee Raee versus* collector of Sarun, is not decisive, as shewn by the remark at page 276 of Volume VII. of the Sudder Dewanny Adawlut Reports of selected cases. In all the other cases alluded to, the parties suing for reversal of sale were shewn to have given an express, or implied consent to the appropriation of the sale proceeds; and, consequently, their claim was barred by

Clause 1, Section 27, Regulation 11 of 1822. In the present case, there is nothing to shew that the plaintiff, proprietor, has done any thing but object to the sale from the day it was made; and, consequently, the payment by the civil court, of the debts of another sharer out of the proceeds of sale, cannot bar the plaintiff's right to sue for a reversal of the sale.

On these grounds we affirm the decision of the zillah judge, in so far as it cancels the sale.

The liabilities are to be adjusted as follows:—

The amount of the purchase money, which has been credited to Government, to be refunded to the purchasers, with interest, at 12 per cent. per annum. The sum in deposit to be also paid over to them immediately; but without interest, with reference to the provisions of Clause 1, Section 27, Regulation 11, 1822. The amount paid away in execution of decrees of court to be demanded by the civil court from the sharers in whose behalf it has been paid; and interest to be charged thereon at the rate of 12 per cent. per annum, from the day the property is restored to the late proprietors. Should the sharers fail to pay in the amount at once, their shares of the estate to be sold by the court in satisfaction of the demand, as they would have been liable to be sold in execution of the decrees.

The plaintiff to receive *mesne* profits on her share of the property, with interest from the day on which the amount may be ascertained. The sharers who have not sued will necessarily recover their property under this decree; but are not entitled to *wasilaut*.

All costs of the lower court to be paid by Government, together with its own and respondent's costs in this Court. The appellant—purchasers to pay their own costs of appeal.

THE 9TH MARCH 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 851 OF 1846.

In the matter of the petition of Ram Chundur Dut and Kalee Churn Dut, filed in this Court on the 7th November 1846, praying for the admission of a special appeal from the decision of the judge of zillah 24-Pergunnahs, under date the 30th July 1846; affirming that of the principal sudder ameen of that district, under date 24th March 1846, in the case of Ram Chund Bose, plaintiff, *versus* Ram Chundur Dut and Kalee Churn Dut, defendants.

In this case the plaintiff sued the petitioners to recover possession of 55 *biggahs*, 6 *cottahs*, of *lakhiraj* land. He stated the

land had descended to his father, Debee Purshad, and his brother, Gokool Chundur. That Gokool Chundur died without leaving a son, in consequence of which the entire 55 *biggahs*, 6 *cottahs*, became the property of Debee Purshad, plaintiff's father, from whom he inherited the property. One of the pleas of the defendants was, that the plaintiff was only proprietor of a moiety of the lands,—Gokool Chundur having left a widow, and a grandson by his daughter. On this, Trippoorah Soondree, the widow of Gokool Chundur, filed a petition, to the effect that she had no objection to the suit being instituted and carried on by the plaintiff. Here the matter dropt; and neither the principal sudder ameen, nor the judge in appeal, though the plea was again urged, took the slightest notice of the point, and eventually decreed for the plaintiff.

I consider it essential, that a plaintiff must show a legal title to the property he comes into court to claim. Here it was disputed, and no notice was taken of the plea. I therefore deem the proceedings of the lower courts to be incomplete; and, quashing both decisions, remand the case to the principal sudder ameen, in order, that the point above noticed may receive due consideration.

THE 9TH MARCH 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 221 OF 1846.

Regular Appeal from a decision passed by Captain Charles Scott, Principal Assistant Commissioner, Kamroop Assam, June 26th, 1846.

BIKRAM DEB, APPELLANT, (DEFENDANT,)

versus

BHOOBUN MOHUN DEB, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—G. S. Judge, Raee Sreenath Sein, and Gopal Kishen.

Wukeels of Respondent—Ram Pran Raee and Bunsee Buddun Mitr.

SUIT laid at Company's rupees 11,002-0-0, on account of proceeds of *shuster*, and to obtain possession of the *shustereah* of Burpatah *shuster*.

The particulars of the case are set forth in the following decision of the lower court, together with the reasons for the same.

‘The proceedings connected with this suit have run to great length, owing to the mass of documents that have been lodged by either party : the greater portion of these are useless and unnecessary, as regards the real merits of the claim, and the opposition set up against it. The real facts connected with this case, and the conclusion to be arrived at on a consideration of these facts, are, in my opinion, comprised within a very small compass, and may be disposed of in a very few words. Setting aside, therefore, all the conflicting matter contained in these voluminous proceedings, and so irrelevant to the point at issue, I will at once, in a few words, record the grounds of my decision. Plaintiff states that defendant was the *boorah-shustereah* of the *shuster* at Burpatah ; that, owing to continued acts of oppression against persons attached to the *shuster*, the defendant had given general dissatisfaction ; and that, in consequence, the *somoo bhokut*, or body of the people attached to the *shuster*, had, according to the custom of their institution and power, vested in them from time immemorial, deposed the defendant, and appointed him to the situation. That defendant had resisted his taking possession of the *guddee* appertaining to the appointment, and had forcibly taken from the store-house of the temple old *Sicca* rupees 10,300, belonging to the institution, and which amount involved* to plaintiff’s charge on being elected by the *somoo bhokut* to the *boorah-shustereahship*. That he had been deprived of rupees 58-4, the proceeds of the appointment for two months, during which he had been kept out of possession by defendant ; that, under these circumstances, he now sues defendant for the above sums, and the right to the *guddee*, or situation of *boorah-shustereah*.

‘ Old <i>Sicca</i> rupees,	10,300	0	0
‘ Batta on exchange into Company’s rupees,	643	12	0
‘ Proceeds of <i>shustereahship</i> ,	58	4	0
<hr/>			
Total Company’s rupees,..	11,002	0	0

‘ This is the substance of the plaint clipped of all superfluous and irrelevant matter.

‘ The defendant opposes the claim on the following grounds :—

‘ *First.* That the claim for this *guddee* was once before tried, and given in his favor ; and, therefore, this suit is inadmissible.

‘ *Secondly.* That two claims, one on account of the *guddee* and its proceeds, and the other on account of money belonging to the *shuster*, have been included in one suit ; and that, therefore, this is irregular.

‘ *Thirdly.* That the orders of Government for filling up of appointments belonging to religious institutions, only provide for filling up *vacancies* ; and that, since no vacancy has occurred, no fresh appointment can take place. *

* Sic in original.

' *Fourthly.* That the *somoo bhokut* have no power to either turn out, or appoint a *shustereah*; the nomination of a successor resting entirely with the vacating party; such vacation depending alone upon the death of the incumbents.

' I have the following remarks to record on these several points.

' *First.* It appears, that on the death of defendant's uncle, who was then *boorah-shustereah*, certain persons, named Kishnokunt and Anahdar, claimed the appointment, on the ground that they being the *deka*, or *naib shustereahs*, were, by right, entitled to succeed to the higher grade of *boorah-shustereah*. The *somoo bhokuts*, however, opposed them, and insisted upon appointing the present defendant. The then principal assistant commissioner, Captain Matthie, decided in favor of the *dekas*. The present defendant appealed from this decision; and, in 1838, the commissioner set aside the principal assistant's order, and appointed defendant, on the ground that the *somoo bhokut*, or the greatest portion of the people attached to the temple, being in his favor, according to the customs of this institution, he was entitled to succeed.

' Defendant alludes to this suit in his first plea. It will be observed, that the present plaintiff was in no way a party in that suit: therefore defendant getting a decree in litigating with a third party, cannot prevent plaintiff from instituting a suit against him at any subsequent period for the same matter; nor can it interfere with any claim he may have in it, and bar his obtaining any right he may succeed in establishing. Besides, the subsequent orders of Government, on the subject of interference with religious endowments, have so completely set aside the customs and rules in force in 1838, that if even the plaintiffs, who lost their suit in that year, now wished to sue defendant afresh, they could do so with perfect propriety. In those days, the nominations to the several temple appointments rested with the Government officers in charge of districts; but the orders of Government, issued in 1842, take this patronage and power out of the hands of their officers, and vest it in the majority of the people attached to each temple; so that any person, who was formerly appointed by the collector, or obtained even a formal decree, can now be set aside by the people, and a successor nominated by them. This is now done almost daily. Again, till the publication of Act 5 of 1843, our courts not only countenanced sale and purchase of slaves, but were authorized to decree slaves: of such decrees there are hundreds in the province. But, since the above Act came into operation, the slaves formerly decreed are at liberty to go where they please; and thus those decrees are now rendered null and void. It is precisely in this way, that all orders and decrees connected with temples, formally passed prior to the rules laid down by Government in 1842, for the internal management of these institutions, were promulgated, are, since the publication and enforcement of those

rules, altogether set aside and rendered worthless. Defendant's decree, therefore, obtained in 1838, is of little, or rather of no value at the present day as a document for keeping him in indisputable possession of the appointment, from which he has been removed by those who have the power to depose him, viz. the *somoo bhokut*.

'*Secondly*.—Defendant urges, that two claims having been included in one suit, the admission of it is irregular. This plea is altogether frivolous; for the *guddee*, its proceeds, and the money, all appertain to the same temple, and are so connected one with the other, that the claim for one portion, without the other, would be irregular. Not only has this court considered the plaint regular by allowing of its institution, but the matter has been before the courts of the deputy commissioner, the commissioner, and the Sudder Dewanny Adawlut; but in none of these courts was the claim pronounced irregular, *on the grounds* here urged by defendant.

'*Thirdly*.—Defendant urges, that the rules lately passed by Government, for the internal management of temples, only provides for the filling up of vacancies. That since no vacancy has occurred, no fresh appointment can take place. On a reference to Mr. Secretary to the Government of India Halliday's letter No. 501, of the 25th April 1842, to the Sudder Board of Revenue, a copy of which was circulated to the officers in Assam by the revenue commissioners, and received in the revenue department of this district with that officer's letter No. 170, of the 25th of May 1842, I find that no allusion whatever is made to vacancies occurring when alone fresh elections were to take place. Mr. Halliday observes, with reference to non-interference with *shusters*: 'In regard to the *shusters*, all the authorities are agreed that this may be done at once. Since the persons concerned have a known rule and custom of *self* election, &c.:' and the revenue commissioner, in the 4th paragraph of his letter, says: 'In furtherance of the orders of Government, you will be pleased to inform the communities of the temples of *Hazoo* and the *Oomanund*, that, if the majority of the people of each temple *choose to displace* the suspended *sewachuhvahs* and *Jogessur Gossain*, they are at liberty to do so, and proceed to a new election, &c. &c.' Here is positive authority given to the majority to *displace* present incumbents, and elect new ones. According to this authority, the majority have caused a vacancy by displacing the defendant, and then filled up the vacancy by nominating the plaintiff. This is sufficient to set aside this objection on the part of the defendant.

'*Fourthly*.—The defendant's last plea, is, that the *bhokuts* have no power to either turn out or appoint,—tenure of appointment only ceasing with death, and the successor being appointed by the dying person. This will be found to be a bold and unguarded assertion,

when compared with defendant's own former statements ; for, in his reply to the suit in 1838, to which I have before referred, he distinctly states, that this power is altogether vested in the *somoo bhokut* ; and his own appointment was effected by the *bhokuts*, although his opponents were at the time *deka* or *naib shustereahs*, whilst he, defendant, held no appointment at all : and so completely are the *somoo bhokuts* the paramount power, and masters of all that relate to their temple, that even the *lakhirajee* decree is given in the name of the *somoo bhokuts*. The *pholee* granted by Seebasing Rajah is in the name of the *bhokuts* and their heirs,—no mention whatsoever being made of a *shustereah*. In conclusion, I have not considered it necessary to have a polling of the *bhokuts* ; because, in the first place, the seal of the *somoo* is attached to the list of voters on the part of the plaintiff, thereby rendering it the act of the *somoo*, or majority : nor has the defendant endeavoured to falsify, in any way, this list, or even to dispute the correctness of one single vote entered in it ; nor has he expressed a wish for a polling, and which he doubtless would have done, had he thought he had any chance of having the majority with him. On the contrary, he has indirectly admitted that the *somoo* are opposed to him, and in favor of plaintiff ; for, instead of at any time denying that the *somoo* were in favor of the plaintiff or against him (defendant) he all along urges that the *somoo* have no power to turn him out, and to elect plaintiff ; thereby admitting, that they are opposed to him. The sub-assistant's proceedings in the criminal court, dated the 4th September 1844, also show, that, on the occasion of an expected riot on the part of these disputants, it was found, that, whilst upwards of 300 of the *bhokuts* were collected to support plaintiff in getting possession of the *guddee*, only 30 or 35 were forthcoming on the part of the defendant. Personal residence too, in Burputah, has afforded me ample opportunities of having both ocular and oral proof of the feeling of the *bhokuts* against the defendant, and in favor of plaintiff.

‘On a careful hearing of the whole of the proceedings in this case, and an attentive consideration of all the points involved, I am of opinion, that the evidence, as regards the monetary claim, is insufficient ; but, as regards a right to the *guddee*, or appointment of *boorah shustereah*, this is conclusive and established fully. I therefore set aside so much of the claim as refers to money, but decree the appointment in favor of plaintiff ; with this addition, that, should plaintiff be able to prove, at the time of the execution of the decree, the amount of the proceeds of the appointment he has lost, by being dispossessed, or kept out of by defendant, he will be entitled to it. Since the plaintiff has failed entirely to establish the monetary claim, I direct that he be responsible for all costs of both parties. *Wukeels* to receive full fees.’

On the part of appellant it was urged, that the *bhokut* had no authority to displace the incumbent of the *guddee* ; and that the

powers invested in them, by the Government, only extended to appointment on occurrence of a vacancy ; and that as his appointment had been upheld by a court of justice, the plaintiff's suit was inadmissible. Further, that the plaintiff should have been non-suited, as he had laid his suit without valuation of the *guddee*.

On the part of respondent it was insisted, that appellant had been guilty of divers misdeeds, which would have rendered him an out-cast ; and that, therefore, the *somoo bhokut* were authorized, and justified, in displacing him.

There is nothing on record, which clearly settles the *first* point to be decided, viz. who constitute the authority for appointing and displacing the *boroo shustear*,—the *somoo bhokut* with the *mohunts* of the other *shusters*, as asserted by appellant ; or the *somoo bhokut* only, as affirmed by the respondent. The *second* point also is not established, viz. that appellant has been guilty of misdeeds, which render his removal justifiable ; and the *third* point likewise, viz. if the *somoo bhokut* alone have the power of dismissal, the fact of their having dismissed appellant, and appointed respondent, is not satisfactorily proved. *Lastly*, it is to be observed, that the plaintiff has preferred three claims in this suit : *first*, recovery of 10,300 old rupees, taken from the storehouse of the temple ; *second*, recovery of 58 rupees, 4 *annas*, amount of two months' proceeds of the *shustereeahship* ; and, *third*, possession on the *guddee*. Yet he has estimated his suit on the two first only, and not valued at all possession of the *guddee*.

The case is therefore remanded for re-trial. The lower court will call for satisfactory evidence to establish all of the three points above indicated from the plaintiff ; and, after hearing whatever the defendant may have to offer in refutation, decide.

The court will also call upon the plaintiff to remedy the defect in his plaint, on pain of nonsuit.

THE 9TH MARCH 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 17 of 1847.

BHOOBUN MOHUN DEB, APPELLANT, (PLAINTIFF,)

versus

BIKRAM DEB, RESPONDENT, (DEFENDANT.)

Wukeels of Appellant—Ram Pran Rae and Bunsee Buddun Mitr.

Wukeels of Respondent—Rae Sreenath Sein.

THIS is a second appeal from the same decision as the above, respecting the monetary claims dismissed ; and is remanded in like manner.

THE 11TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 156 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, May 9th, 1845 ; reversing a decree passed by the Moonsiff of Koelee, December 14th, 1844.

BUKTO CHOWDHRAIN AND RUBEE CHOWDHRAIN,
APPELLANTS, (PLAINTIFFS,)

versus

KERUT SINGH, RESPONDENT, (DEFENDANT.)

Wuheel of Appellants—Hamid Russool.

Wuheels of Respondent—J. G. Waller and E. Colebrooke.

THIS case was admitted to special appeal, on the 18th February 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘ In this case the parties reside in zillah Tirhoot, and are governed by the rules of the *mithila* school, according to which females are not admitted as heirs in an undivided family.

‘ I admit the special appeal in this case on a point of law, viz. as to what constitutes a division of a family, for the purposes of female succession as heirs under the *Hindoo* law prevailing in Tirhoot.

‘ The principal sudder ameen was of opinion that an actual division of the landed property of the family, with distinct occupation thereof, by the respective sharers, was essential ; and that division as to food and business, without such distinct division and occupation of the landed property, did not constitute division in the eye of the law.

‘ On this point I took a *bewustah* from the pundit of our Court, in which he states that a division as to food and business, though not accompanied with division of the landed property, is sufficient, in the eye of the law, to admit a female as heir to her husband for her life-time.

‘ This non-division of the landed property was deemed sufficient by the principal sudder ameen to exclude plaintiffs in this case from succeeding to their husband’s estate. I therefore admit the special appeal to try whether this was a sufficient ground for rejecting their claim.*

On a more careful consideration of the decree of the principal sudder ameen, we observe that he not only holds it as proved that the property was undivided, but that, at the time of the death of Byjoo Singh, the husband of the plaintiffs, the family was also undivided. The question, therefore, involved in the certificate does not arise.

We accordingly affirm the decree of the principal sudder ameen; and dismiss the appeal with costs against the special appellants.

THE 11TH MARCH 1848.

PRESENT:

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 120 OF 1847.

Special Appeal from a decision passed by the Judge of 24-Pergunnahs, April 29th, 1845; affirming a decree passed by the Additional Principal Sudder Ameen, June 20th, 1844.

ROODERPURSHAD MOOKERJEE, GUARDIAN OF RAM-
CHUNDUR PAL CHOWDHREE, AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

PARUSHNATH SINGH CHOWDHREE AND OTHERS,
RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellants—Ramapurshad Raee.

Wukeels of Respondents—J. G. Waller and Bunsee Buddun Mitr.

THIS case was admitted to special appeal, on the 19th January 1847, under the following certificate recorded by Mr. Charles Tucker:—

‘The present case was a contested boundary: the plaintiff stating the lands to appertain to *mouzah* Balooka, the defendants to *mouzah* Majparah. By the decrees they are declared to appertain to Majparah. A suit was decided in 1839 between the same parties, from which it would appear that a part of the lands, now decided to belong to Majparah, were in that case allowed to belong to *mouzah* Balooka; so that the two decisions are at variance with each other as to the boundary. If the present decrees be allowed to stand good, they will be opposed to another decree, which has been affirmed up to a special appeal.

‘I therefore admit the special appeal applied for, to try whether the lower courts were not bound to abide by the boundary fixed in the former case.’

On referring to the record, we find that in the former case alluded to, a dispute existed as to the boundary between the village of Deegparah, belonging to the same party as sues in this case, and that of Majparah, the property of the defendants. In the map, prepared in that case, the boundary was also drawn between the villages of Balooka and Majparah; and the plaintiff contends that the decisions of the lower courts are opposed to what was then laid down as such boundary. The question, however, in that case was the boundary between Deegparah and Majparah, and the laying down of any boundary line between Balooka and Majparah was superfluous. The former decree is binding as to the immediate point at issue between the parties, but it can go no further. The mere laying down a boundary between lands not then in dispute, cannot prevent further enquiry in regard to those lands, or bind the Court in its decision in the present case. We accordingly dismiss the appeal, and confirm the decrees of the lower courts. The costs to be paid by the appellant.

THE 11TH MARCH 1848.

PRESENT :

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 207 OF 1847.

Special Appeal from a decision passed by the Judge of 24- Pergunnahs, April 29th, 1845; affirming a decree passed by the Additional Principal Sudder Ameen, June 20th, 1844.

ROODURPURSHAD MOOKERJEE, GUARDIAN OF RAM-
CHUNDUR PAL CHOWDHREE, AND OTHERS, APPEL-
LANTS (DEFENDANTS,)

versus

PARNUSHNATH SINGH CHOWDHREE, AND OTHERS,
RESPONDENTS, (PLAINTIFFS,)

Wukeel of Appellants,—Ramapurshad Raee.

Wukeels of Respondents,—J. G. Waller and Bunsee Buddun Mitr.

THIS case was admitted to special appeal by Mr. Charles Tucker, on the 19th January 1847, on the same grounds as those stated in the preceding decision. It is similar in every respect, except as to the amount claimed, with No. 120, disposed of this day, and the decision is the same.

THE 11TH MARCH 1848.

PRESENT :

C. TUCKER, Esq. and

SIR, R. BARLOW BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 164 of 1847.

Special Appeal from a decision passed by the Judge of Zillah Sarun, June 12th, 1845 ; reversing a decree passed by the Principal Sudder Ameen, February 18th, 1844.

SYUD MOHUMMUD BAKUR, APPELLANT, (PLAINTIFF,)

versus

BLANCHARD, SPENCE, AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeels of Appellant—J. G. Waller and Hamid Russool.

Wukeel of Respondents—C. Glas.

THIS case was admitted to special appeal, on the 6th March 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘ In this case the plaintiff sued Messrs. Blanchard and Spence for the recovery of rupees 2,501, on a bond dated 9th November 1842, executed by Mr. Blanchard only. The money was borrowed by Mr. Blanchard for the benefit of an indigo factory, called Arwah, (as shewn by the bond) of which Mr. Blanchard was at that time the resident manager. A few months afterwards, Messrs. Blanchard and Spence purchased the factory in equal shares.

‘ The principal sudder ameen decreed against both Messrs. Blanchard and Spence ; but, on appeal, the judge exonerated Mr. Spence, decreeing against Mr. Blanchard, with permission to bring to sale his moiety of the factory in execution of the decree. The judge assigns the following grounds for his judgment. ‘ That when the debt was contracted, Mr. Blanchard was manager only, without any proprietary right in the factory. That there was no evidence to show that he had authority to borrow money on security of the factory : on the contrary, that it appeared from a letter of the assignee, Mr. J. W. Alexander, to Mr. Blanchard, dated 12th September 1842, that he, Mr. Blanchard, was permitted

to draw for a limited sum only, the amount of which was fixed at rupees 1,500 for that season ; and, further, that the deed of sale, by which the factory was transferred to Messrs. Blanchard and Spence, mentions that the factory was not responsible for any debt ; and that in the accounts rendered by Mr. Blanchard to the assignee, the amount borrowed was not included.'

'I conceive this decision of the judge to be opposed to the universal practice which prevails in such transactions. I believe that the resident manager is always considered competent to borrow money for the factory.

'Mr. Alexander's letter amounts to this only, that he, as assignee, would not honor Mr. Blanchard's drafts to an extent exceeding 1,500 rupees ; but it is clear that the parties contemplated the purchase for some time previous, and that the money borrowed was due when Mr. Spence joined Mr. Blanchard in purchasing the factory. It is equally obvious, that the sum thus borrowed could not be entered in the accounts furnished to the assignee, which would account for such sums only as may have been advanced by the assignees.

'But, however this may be, the universal practice I believe to be that, if nothing be said to the contrary, a person purchasing an indigo factory is responsible for the debts due by the factory, and is entitled to all sums due to the factory. On these grounds, I admit a special appeal, considering the decision of the judge, in exonerating Mr. Spence, to be contrary to the custom which prevails in such transactions.'

It is in evidence, that the money was borrowed for the benefit of the factory ; and it is the general practice, that if money be borrowed for a factory, by a party competent to borrow, the factory is responsible for it, notwithstanding transfer by purchase, as the transfer carries with it all the liabilities of the factory. Under the particular circumstances of this case, the question whether Blanchard was a party competent to borrow, at the time of borrowing, does not arise. Blanchard and Spence, within three months after the borrowing of the money, purchased the factory. Spence does not deny that he was cognizant of the debt at the time he purchased conjointly with Blanchard : he rests upon mere technicalities ; and, in the absence of any such denial on his part, it must be presumed that he was cognizant of the debt, and in that case he cannot claim exemption for his share of the factory.

With reference therefore to the usual practice in such instances, and to what the justice of the case demands, we are of opinion that the factory generally must be considered as chargeable with the debt ; and we modify the decree of the zillah judge accordingly, and decree for the appellant with costs in this and the lower courts.

THE 11TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 165 OF 1847.

Special Appeal from a decision passed by the Judge of Zillah Sarun, June 12th, 1845 ; reversing a decree passed by the Principal Sudder Ameen, February 18th, 1844.

ALIKAH SAHOO, APPELLANT, (PLAINTIFF,)

versus

BLANCHARD, SPENCE, AND OTHERS, RESPONDENTS,

(DEFENDANTS.)

THIS case was admitted to special appeal by Mr. C. Tucker, on the 6th March 1847, on the same grounds as those set forth in the preceding case. It is similar in every respect, except as to the amount claimed with No. 164, disposed of this day, and the decision is the same.

THE 11TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 160 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, July 17th, 1845 ; reversing a decree passed by the Sudder Ameen, July 16th, 1844.

GOVIND MISR AND ISHREE DUT PAUREE, APPELLANTS, (DEFENDANTS,)

versus

SEETARAM OPADHYA, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellants—Sheikh Azmutoollah.

Respondents—absent.

THIS case was admitted to special appeal, on the 27th February 1847, under the following certificate recorded by Mr. C. Tucker :

‘ The plaintiff in this case sued the petitioners for balance of rent from 1248 to 1250 F. S. Amongst other pleas, the petitioners urged that the plaintiff had removed them from the management, and taken the collections into his own hands; and this is admitted by the principal sudder ameen, who, however, remarks that this does not exonerate the petitioners; and he reversed the decision of the sudder ameen, who dismissed the plaintiff’s claim.

‘ This is decidedly opposed to the law. A zemindar cannot attach lands and take the collections into his own hands, pending an existing lease, unless he first brings a suit against the tenant for balances due, and until after arrest the tenant refuse to discharge the arrear demanded, vide Clause 6, Section 15, Regulation 7, 1799. If without observing this process, a zemindar attach the lands of an under-tenant, the under-tenant is exonerated.

‘ I therefore admit the special appeal applied for, conceiving the decree of the principal sudder ameen to be contrary to law, and the practice of the courts.’

MR. TUCKER AND SIR R. BARLOW.—In this case the appellants were under joint engagements to the respondent, as *kutkeenadars*, for nine years, viz. from 1248 to 1256 F. Govind Misr, appellant, pleaded that the plaintiff had accepted his resignation at the close of the year 1248. This was denied by the plaintiff, and was overruled by the principal sudder ameen; but whether the fact be true or false, it is of no consequence: for, when the plaintiff admitted having taken the collection into his own hands, without showing that he was legally authorised to do so, we hold, that, under Clause 2, Section 18, Regulation 8 of 1819, the appellants were exonerated from the responsibility, which otherwise would have attached to them. We accordingly decree for the appellants with costs, reversing the decision of the principal sudder ameen.

MR. HAWKINS.—While I fully concur with my colleagues that a proprietor, or farmer, cannot attach an intermediate tenure, without first bringing a summary suit for arrears of rent, I am not prepared to say with the certificate, that the decree of the principal sudder ameen is contrary to the practice of our courts. That the attachment was illegal has not been pleaded by the defendants from first to last, not even in their application for the admission of a special appeal: this point in their favor has been taken up in the certificate of this Court. The defendants did not urge that the attachment was illegal, but that having taken place, they were not responsible for the arrears. This was the point at issue before the principal sudder ameen; and as he decided the case upon that, I cannot see any thing irregular in his decree. Agreeing with my colleagues then in their judgment upon the mere point of law contained in the certificate, that a proprietor, or farmer, cannot attach an intermediate tenure without prior

institution of a summary suit for arrears of rent, I do not think that, under the circumstances of the case, the Court was required to find a ground for rejection of the suit, which the defendants did not urge themselves. The case, however, is disposed of, and any order from me is unnecessary.

THE 11TH MARCH 1848.

PRESENT :

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 208 OF 1847.

Special Appeal from a decision passed by Moulvee Niamut Ali, Principal Sudder Ameen of Tirhoot, December 23rd, 1844; reversing a decree passed by the Moonsiff of Koelee, April 10th, 1844.

MUSST. BEEBUN, APPELLANT, (DEFENDANT,)

versus

DEENDYAL SINGH AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

Wukeel of Appellant—Abas Ali.

Wukeel of Respondents—Gopal Kishen Raee.

THIS case was admitted to special appeal, on the 14th January 1847, under the following certificate recorded by Mr. J. F. M. Reid:—

‘Deendyal Singh and others, instituted a suit (No. 3307) before the moonsiff of Koelee, against Musst. Beebun, to obtain possession of 1 *anna* out of 16 *annas* of Shunkerpoor, and $\frac{1}{2}$ *anna* out of 8 *annas* of Bazeedpoor, under a deed of sale alleged to have been executed by Musst. Beebun, through the agency of her husband, Ushruf Ali, in favor Puriag Dut, ancestor of the plaintiffs. Musst. Beebun denied the sale *in toto*, and pleaded that her husband had no right to sell for her, the property being her’s by inheritance from her father.

‘The moonsiff of Koelee, Mohummud Fureedooddeen, dismissed the plaintiffs’ suit, because it appeared that, with reference to the extent of the property of Sheikh Gholam Kadir, father of Musst. Beebun, in the villages of Shunkerpoor and Bazeedpoor, the share of that individual was 1 *anna*, 13 *gundahs*, 1 *cowrie*, 6 *boorees*, 13 *dunds* in the former, and 16 *gundahs*, 1 *cowrie* in

the latter village; and that she had, as proved by a decree, sold 1 *anna* of Shunkerpoor to one Raj Komar Singh, so that she did not possess 1 *anna* in Shunkerpoor, and could not have sold it. It must be kept in mind, that three other suits were pending in the moonsiff's court of Koelee, brought by other plaintiffs against other defendants, for other shares ($\frac{1}{2}$ *anna* on No. 3,314; 2 *gundahs* on No. 3,369; and $\frac{1}{4}$ *anna* on No. 3,370) of Shunkerpoor. The moonsiff in the same decree, that No. 3,314, dismissed the claims of the several plaintiffs, merely referring to his reasons in the other decrees.

This appears to me to be highly irregular; but I leave it to the judges, before whom this special appeal may come on, to take proper notice of it. Of these four decisions, two,—viz. in Nos. 3,307, and 3,314,—were appealed, and referred to the principal sudder ameen, Moulvee Niamut Ali, who reversed the moonsiff's decision in the present case, for reasons recorded by him in the appeal from the decision in No. 3,314, on a former date, viz. 5th October 1844, without recapitulating them in this decision, or appending them thereto, so that it might be seen from his decree why he awarded possession to the plaintiffs. This also should be noticed. But it appears that the principal sudder ameen, in his decision of 5th October 1844, says that the defendant in that case did in a manner acknowledge the sale to the plaintiff of that case. Here the defendant, Musst. Beebun, most positively denies the execution of the deed of sale to Puriag Dut. The proceedings were called for by me; no deed of sale appears to have been filed, nor any enquiry made as to the fact of the deed of sale ever having been executed. The decision cannot, therefore, stand. I admit the appeal with a view to having the decision set aside, the case sent back for retrial on the points above indicated, and the proceedings of the moonsiff and principal sudder ameen duly noticed by a full court. As it appears to me proper, when it may be necessary to animadvert on the conduct of native judges, that it be done as soon as possible. I further direct, that as soon as the respondents have been duly summoned and the case is ready, it be brought before a full bench without reference to its number on the file.

The parties in the two cases (3,307 and 3,314) are different, and the actions were founded on separate deeds of sale. It does not therefore appear how the principal sudder ameen could have decided this case for reasons recorded in another in no way connected with it. We accordingly remand the case, with instructions to the principal sudder ameen, to decide it upon its own merits, and to record his reasons for his judgment fully in his decree. A copy of Mr. Reid's certificate will accompany this order, for such explanation as the principal sudder ameen may wish to offer.

THE 13TH MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 588 OF 1846.

IN the matter of the petition of Prosunno Komar Thakur, filed in this Court on the 22d August 1846, praying for the admission of a special appeal from the decision of the additional principal sudder ameen of zillah 24-Pergunnahs, under date the 22d May 1846; affirming that of the moonsiff of Manicktullah, under date 28th November 1845, in the case of Kasheenath Pal, plaintiff, *versus* Prosunno Komar Thakur, defendant.

In this case the plaintiff sued the petitioner for levying an excess of rent from him, in the years 1249, 1250, 1251 B. S., and the suit was brought on the 25th *Srabon* 1252 B. S., and the lower courts decreed for the plaintiff.

But, under the provisions of Section 7, Regulation 2, of 1805, such claims should be preferred to the proper courts of justice within one year after the cause of action shall have arisen; and as this point was not taken notice of by either of the lower courts, I quash the decrees of both the lower courts; and, under Section 2, Regulation 9, 1831, remand the proceedings to the moonsiff's court for retrial, with reference to the enactment of 1805 above indicated.

THE 13TH MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 875 OF 1846.

IN the matter of the petition of Suddeeram Dekakooch, filed in this Court on the 20th November 1846, praying for the admission of a special appeal from the decision of the sub-assistant commissioner of Nowgong in Assam, under date the 5th August 1846; reversing that of the moonsiff of Nowgong, under date the 21st March 1846, in the case of Ramdas Shab, plaintiff, *versus* Suddeeram Dekakooch, defendant.

This case was dismissed by the moonsiff on default under the provisions of Act 29 of 1841; and, on appeal by the defaulting plaintiff, the appellate court passed a decree awarding the amount sued for by the defaulting plaintiff.

Section 3, Act 29 of 1841, declares, that no appeal shall lie against a decision passed in accordance with the provisions of

the preceding Clauses of the Act, other than a summary appeal on the fact of default.

The appellate court, therefore, should have confined its enquiries to the fact of the default alleged against the appellant ; and, if not established, the appellate court should have remanded the proceedings to the moonsiff's court, with an injunction to replace it on his file, and to dispose of it *de novo*. If, on the contrary, the default were established, the appellate court had no resource but to dismiss the appeal. I accordingly admit a special appeal ; and remand the proceedings to the sub-assistant commissioner to be dealt with as above indicated.

THE 14TH MARCH 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

CASE No. 152 OF 1846.

Regular Appeal from a decree passed by the Principal Sudder Ameen of Sarun, Mohummud Rafik Khan, December 15th, 1845.

DHUUJOO RAE AND OTHERS, APPELLANTS, (CLAIMANTS,)

versus

UCHEE LAL AND CHUNDURMUN TEWAREE,
RESPONDENTS, (PLAINTIFFS.)

Wukeels of Appellants—E. Colebrooke and Abas Ali.

Wukeel of Respondents—J. G. Waller.

THIS suit was instituted by respondents, on the 6th April 1844, for half the village of Kurom, with *mesne* profits on the same, and interest. The action was brought against another party ; but appellants protested against the zillah courts' cognizance of the claim preferred by respondents, on the ground of their own prior right founded on the purchase by them of a decree obtained against the proprietors by Thakur Singh and another, for 1,523 rupees, which had been advanced on a lease of the lands.

The principal sudder ameen, not deeming the petition presented by appellants to contain any bar to his disposal of the case, decided it upon its merits, and passed judgment in favor of respondents.

Against this judgment, the present appeal has been brought by a petition to the same purport as before ; and, as this is all the *wukeels* of appellants have been instructed to file or proceed upon, the case may be disposed of without further reference to it. The appeal is accordingly dismissed, with costs payable by those who preferred it.

THE 14TH MARCH 1848.

PRESENT:

R. H. RATTRAY, ESQ.,

JUDGE.

CASE No. 438 OF 1847.

Regular Appeal from a decree passed by the Principal Sudder Ameen of Sarun, Mohummud Rafik Khan, December 15th, 1845.

RAM TUWUKUL RAEI AND OTHERS, (APPELLANTS),
DEFENDANTS,

versus

UCHEE LAL AND CHUNDURMUN TEWAREE, (RESPONDENTS,) PLAINTIFFS.

Wukeel of Appellants—Ameer Ali.

Wukeel of Respondents—J. G. Waller.

THIS suit was instituted by respondents, on the 6th April 1844, to obtain possession of half the village of Kurom, with *mesne* profits on the same during the period of dispossession, and interest: the total estimate for stamp, Company's rupees 14,427-9-6.

This is the case alluded to in No. 152, (preceding) disposed of at the present sitting of the Court.

Respondents sued under deeds of sale and agreement, entered into between them and the proprietors of these lands on the 6th April 1832; and have obtained a decree as purchasers of the property. Their right of possession is not now disputed: the present appeal being only against the award of *mesne* profits, which appellants protest against being made responsible for, on the ground of having themselves held under a *bybilwuffa*, or deed of conditional sale, obtained previously to that upon which respondents have based their action, and of the non-competency of the *maliks* to enter into new engagements till all accounts connected with theirs' should have been satisfied and settled.

The real facts of the transaction to which appellants thus refer, would appear to have been as follows:—On the 9th December 1826, a deed (which they represent to have been a *bybilwuffa*) was executed, on specified conditions, in their favor, by Surpdoovur Sahee and another, proprietors of half the village of Kurom, who received from appellants the consideration agreed upon. On the 24th November 1834, the stipulated payment, of the sum advanced by appellants, not having been made, a decree for the foreclosure of the *bybilwuffa* was passed in the court of the principal sudder ameen, in virtue of which the proprietary right of the lands became judicially vested in appellants. Against this decree, however,

the old *maliks* appealed; and, on the 24th January 1838, the transaction of 1826, was determined to have been one of simple mortgage, the transfer of the lands was cancelled, and acceptance by appellants enjoined of the deposit which the old *maliks* had lodged in court in liquidation of their debt to them. This disposal of the matter was sought to be set aside by a special appeal to the Sudder Court; but, on the 10th November 1840, the application was rejected, and the decision of the lower court made final. A petition was subsequently drawn up (June 18th, 1841,) by appellants, praying payment of rupees 4,325, the aforesaid deposit, which was, then, refused; not because appellants were not entitled to receive it, but because one only (Tuwukul Rae,) of the claimants, whose names were to it, was present, and had no authority to act for the rest. The money was afterwards duly paid, and is acknowledged to have been so.

With reference to the above facts and circumstances, appellants had manifestly no right of occupancy; which, nevertheless, they refused to relinquish, and do not deny having held to 1247 F. They are thus clearly liable for the *mesne* profits, to those whose rights they usurped. The principal sudder ameen has decreed accordingly; and, concurring in the propriety and justice of the decision, I affirm it, with costs chargeable to appellants.

THE 14TH MARCH 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 202 OF 1846.

IN the matter of the petition of Deodut Sahoo and others, filed in this Court on the 25th April 1846, praying for the admission of a special appeal from the decision of Mr. A. Smelt, judge of Patna, under date the 20th January 1846; reversing that of the sudder ameen of Patna, under date 13th February 1845, in the case of the petitioners, plaintiffs, *versus* Sheikh Soobhan Ali, defendant.

It is hereby certified that the said application is granted on the following grounds.

This was an action, instituted under Section 6, Regulation 8, 1831, to set aside a summary decree for arrears of rent, obtained by the defendant.

The plaintiffs both in the summary court, and in the present action allege, that they never cultivated any land in the village, for the rent of which the defendant sued summarily; and, further, that the defendant had failed to take the necessary measures, preliminary to such a demand as that now made.

The sudder ameen, for the reasons given by him, gave judgment for the plaintiffs ; but his decree was reversed by the judge.

There were three points in this case to which the judge's attention should have been directed :—*first*, whether the plaintiffs were, or were not, cultivators of the land, the rent of which was demanded from them ; *secondly*, whether, there being no engagements between the parties, the defendant had taken the course prescribed by Sections 9 and 10, Regulation 5, 1812 ; and, *thirdly*, whether the summary action was, or was not, opposed to the provisions of Section 10, Regulation 8, 1831.

The judge has disposed of the first point very summarily ; and he has taken no notice of the remaining points.

Under these circumstances, I admit the appeal ; and remand the case for retrial, it having been decided upon an insufficient investigation of its merits.

THE 14TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 187 of 1846.

IN the matter of the petition of Luckheepreea Dasee, filed in this Court on the 22d April 1846, praying for the admission of a special appeal from the decision of Raee Lokhnath Bose, principal sudder ameen of Jessore, under date the 22d January 1846 ; reversing that of the moonsiff of Tirmohonee, under date 23d July 1845, in the case of the petitioner, plaintiff, *versus* Prannath Chowdhree, and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

The plaintiff sues for possession of certain lands, which she alleged had been obtained by herself, through the agency of her father, in the name of one Juggurnath Deb, her father's servant. The moonsiff gave judgment in her favor ; but his decree was reversed by the principal sudder ameen.

The principal sudder ameen says in his decree, that the plaintiff had not filed any deed of gift, or other document, to prove the gift from her father to herself. But she does not allege that her father ever made a gift of the land to her,—her statement being that she acquired them herself, through the agency of the father. The principal sudder ameen has evidently mistaken the nature of the claim. Under these circumstances, I admit the appeal ; and remand the case for retrial by the principal sudder ameen, with reference to the foregoing remarks.

THE 14TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 218 OF 1846.

IN the matter of the petition of Jugmohun Sein, and others, filed in this Court on the 6th May 1846, praying for the admission of a special appeal from the decision of Mr. A. Sconce, acting judge of Backergunge, under date the 5th March 1846; reversing that of the principal sudder ameen of Backergunge, under date 28th February 1843, in the case of the petitioners, plaintiffs, *versus* Sydooddeen Khan, and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

This was a suit by the plaintiffs to recover possession of certain lands, which the defendants claimed to hold as *lakhiraj*. The plaintiffs had purchased a portion of the estate (a dependant *talook*) in which the lands are situated, at a sale made in execution of a summary decree for rent due upon the estate.

The principal sudder ameen decided in favor of the plaintiffs; but his judgment was reversed by the officiating judge, who observes in his decree, that the principal sudder ameen had proceeded upon a failure of the proof of the defence, whereas he should have dealt with the plaintiff's case, before considering that of the defendants.

The judge's *dictum* is no doubt correct, as laying down a general principle; but a claim to hold land as *lakhiraj* is of the nature of a special plea, the proof of which rests with the party advancing it; and should he fail to prove the validity of his tenure, a decree must be given in favor of the zemindar, or other party entitled to sue, with the view of incorporating the tenure with his general estate. The principle in similar cases in which Government is a party, is laid down in Clause 3, Section 3, Regulation 14, 1825; and the same principle is applicable to cases in which the zemindar may be a party.

Considering, therefore, the decree of the judge to be defective as based upon a wrong principle, I admit the appeal; and remand the case, that it may be again tried with reference to the foregoing remarks. Should the judge be of opinion that the plaintiffs' claim ought to be dismissed, he will state the nature of the proof by which the defendants have established their defence.

THE 16TH MARCH 1848.

PRESENT :

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

E. CURRIE, Esq.

EXERCISING THE POWERS OF A JUDGE.

CASE No. 214 of 1845.

*Regular Appeal from a decision passed by J. Grant, Esq., Judge of
Dinagapore, May 5th, 1845.*

GOVERNMENT, APPELLANT, (DEFENDANT,)

versus

RAMDIAL SINGH, GUARDIAN OF JUGGUT NURAIN RAE, E,
A MINOR SON OF KUMLA MAYE, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Pursun Komar Thakur.

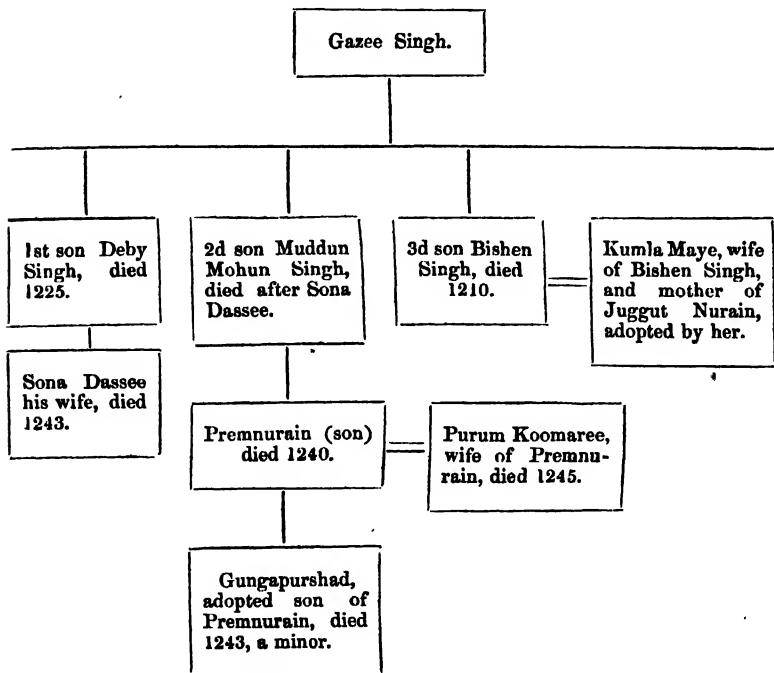
Wukeel of Respondent—Gholam Sufdur.

CLAIM for possession of lot Koornaye, &c., with *mesne* proceeds and interest, under the law of inheritance. Suit laid at rupees 48,666.

The case is thus stated by the judge of Dinagapore, who gave an award in favor of the plaintiff.

‘This suit was instituted on the 14th of March 1843, corresponding with the 2d *Chyte* 1249 B. S., by the plaintiff, on the part of her adopted son Juggut Nurain for succession to the estates *Mouzah* Koornaye, &c. and two others, with an aggregate *sudder jumma* of Company’s rupees 10,814-3-2½. The surplus collections were subsequently sued for in a supplementary plaint, on the ground that the estates had been removed from the court of wards and included in the *khas muhals*. The estates were purchased in the name of Premnurain from Sheikh Doomun in 1210 B. S. On the demise of Premnurain, the estates were brought under the jurisdiction of the court of wards, and continued so after the death of his adopted son, a minor, when they were considered by the revenue authorities to have devolved to Purum Koomaree, the widow of Premnurain. After the death of Purum Koomaree, several claimants came forward, including the plaintiff, and were all referred to the civil court in 1840, as the revenue authorities did not consider any of them justly entitled to succession, or to be recorded in the register of mutations. On the 10th of April 1844, when the suit was first brought to a hearing, the right of Ruggo-

nath Pursooram and Motee Lal, to establish their claims for possession as defendants in this case, was overruled, as they never had been in possession, and their claims to be entered as proprietors in the register of mutations had been rejected by the revenue authorities. The plaintiff claims for her adopted son, as the sole heir of Deby Singh, Muddun Mohun Singh, and Bishen Singh, who were joint proprietors of the estates, purchased by them in the name of Premnurain, the son of Muddun Mohun, according to the following geneological table :—



The following are the principal points urged on the part of Government, as defendant, with reference to the plaintiff. The great length of time from the estates being brought under the court of wards, (3d August 1833,) until she brought forward her claim, (1839) on the death of Purum Koomaree. That there is no proof of the estates having been the joint property of the plaintiff's husband and his two brothers. That the estates were in the name of Premnurain, and after his death under the court of wards, during the minority of his adopted son, Gungapurshad, on whose demise the names of Purum Koomaree, and the plaintiff were entered as proprietors in the collector's books, but the name of the latter was subsequently erased by order of the Sudder Board

of Revenue. That the plaintiff never having claimed even a share of the estates during Premnurnain's time, or when they were brought under the court of wards during Gungapurshad's minority, shows that they were the property of Premnurnain, and that the plaintiff has no right to them; also that there being no legal heir to Premnurnain, the estates lapse to Government. That, in all the plaintiff's petitions, after the death of Premnurnain, there is no mention of her authority to adopt a son. That Purum Koomaree's agreement, making over a quarter share of the estates to the plaintiff, is invalid.

'The plaintiff, in her reply, satisfactorily explains the asserted delay in bringing forward her claim; and states that the agreement between her and Purum Koomaree was not a gift by the latter, but an arrangement between them as proprietors in respect to the shares they were to retain.

'I do not consider it necessary to enter into any detail regarding the transactions and petitions in the collectorate, as, in my opinion, the following are the points for decision, and must, if proved, establish the right of the plaintiff on the part of her adopted son: *first*, were the estates the joint property of the plaintiff's husband, and his brothers, Deby Singh and Muddun Mohun Singh? *second*, did the said three brothers live together, after the purchase of the estates in the name of Premnurnain; and have the several members of their families lived together, and shared jointly in the profits of the estates? *third*, had the plaintiff authority from her husband to adopt a son?

'All the points are clearly proved by evidence; and I see no reason to doubt it, or the authenticity of the document authorizing adoption, which is filed. It is proved by the plaintiff's witnesses that Premnurnain's age was about 14, when the estates were purchased; and there is no attempt on the other side to show that such was not the case, or where the purchase money came from, if not from the funds of his father and uncles; neither is there any denial that all the families lived together, and shared in the profits of the estates, and, subsequently, in the allowance made to the minor and his relations by the court of wards.

'The plaintiff's husband died in 1210 B. S.; and she appears not to have availed herself of her authority to adopt for many years afterwards, and also to have stated that she had no such authority in a petition regarding an agreement between her and Purum Koomaree, touching their shares; but I cannot consider an assertion so unaccountable, had it been true, sufficient to bar the plaintiff's claim, or disinherit her adopted son.

'I therefore decree the case with costs. The estates and surplus collections from them to be the property of the plaintiff, and her adopted son, Juggut Nurnain, subject to the provisions of Regulation 10 of 1793.'

Messrs. Jackson and Currie.—From this award the Government appeals, waiving the point, whether the property belonged to Premnurain alone, or to the whole family, which was not material to the issue of the case ; inasmuch as if the plaintiff is the legally adopted son of Kumla Maye, he would in either case succeed. The Government, however, denies the authority to adopt ; and questions the adoption on this ground. In default of legal heirs, the property falls in as an escheat to Government.

The Government officers took the management of this property into their hands, on the ground of the disqualification of the incumbent owner, on the death of Premnurain, which took place in 1240. This was done by order of the court of wards ; the estate being so held for the benefit of Premnurain's adopted son, Gungapurshad, a minor, who died in 1243, and of Premnurain's widow, Purum Koomaree, who died in 1245. The present claimant is Juggut Nurain, calling himself the adopted son of Bishen Singh, an uncle of Premnurain. He states that Bishen Singh died in 1210, leaving a document (*ijazutnameh*,) dated that same year, empowering his widow, Kumla Maye, to adopt a son ; that she availed herself of this power, after the death of Purum Koomaree, in 1245, and adopted the plaintiff. The document is filed ; and out of many witnesses, whose names are attached, three swear to the execution of it, but none of them can read or write. It seems remarkable, that the widow, Kumla Maye, should not have availed herself of this authority for 34 years ; and further, a petition from her presented to the collector in 1244, is produced, in which she acknowledged she had no authority to adopt. This petition is denied at present ; but we see no sufficient reason whatever to question its authenticity. The testimony of the witnesses appear to us unsatisfactory ; and this, coupled with the petition and the delay of 34 years after the death of her husband, induce us to put no faith in the *ijazutnameh*. We would therefore reverse the judge's decision, and dismiss the claim of plaintiff, with costs.

Mr. Hawkins.—I fully concur with my colleagues. The *ijazutnameh* (or power authorizing the plaintiff to adopt) bears no trace of having been executed in the usual form, or accompanied by the usual formalities of such occasions ; does not bear the signature of any member of the family of the alleged adopting party ; and the signatures of all the attesting witnesses upon it were written by the same individual. The evidence of the witnesses to the document is extremely unsatisfactory ; and bears manifest traces of having been prepared for the occasion. I entertain no doubt whatever of the genuineness of the petition presented to the revenue authorities by the plaintiff in the year 1244,—the more as its statements are in entire keeping with the fact that the plaintiff did not, in the course of 34 years, think of adopting till after the death

of Purum Koomaree, when the property fell into the hands of the Government.

THE 15TH MARCH 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 896 OF 1846.

IN the matter of the petition of Bukshee and Ameerooddeen, filed in this Court on the 26th November 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of zillah Tipperah, under date 22d August 1846; reversing that of the moonsiff of Ameergong, under date 30th March 1846, in the case of Bukshee and Ameerooddeen, plaintiffs, *versus* Reazooddeen and others, defendants.

In this case the plaintiffs sued for the restitution of 41 rupees, which they asserted the defendants had forcibly taken from them; and to cancel a bond for 9 rupees, which they further alleged the defendants had compelled them to execute.

The moonsiff decreed for plaintiffs; but the principal sudder ameen, on appeal, dismissed the claim, because the plaintiffs had not prosecuted their case in the *foujdaree* court.

Considering the reason assigned by the principal sudder ameen, for not entertaining the action, insufficient, I admit a special appeal; and, under the provisions of Clause 2, Section 2, Regulation 9, 1831, remand the proceedings to the principal sudder ameen, with an injunction to decide the case on its merits.

THE 16TH MARCH 1848.

PRESENT:

C. TUCKER, Esq.,

JUDGE.

PETITION No. 923 OF 1846.

IN the matter of the petition of Nubkoomar Banerjea, filed in this Court on the 8th December 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of zillah Nuddea, under date the 8th September 1846; affirming that of the moonsiff of Kishnagur, under date 29th December 1845, in the case of Nubkoomar Banerjea, plaintiff, *versus* Ramchundur Banerjea, defendant.

This was a prosecution at the suit of the petitioner against the defendant, for encroaching on the public road by the erection of a brick wall; and the only issue was one of fact, viz. whether the brick wall stands on what was previously the public road, or on the defendant's private property. Instead of ascertaining this simple point by local investigation, and the evidence of persons residing on the spot, the lower courts have dismissed the suit on quite irrelevant grounds,—such as the road, as now existing, being broader than another adjoining road; and the wall, complained of, not opposing any obstruction to the free passage of men and beasts. I therefore admit the special appeal, and remand the proceedings to the moonsiff's court, under the provisions of Clause 2, Section 2, Regulation 9, 1831, who will enquire specially in what manner the ground now occupied by the wall was occupied previously to the erection of the said wall, and dispose of the case accordingly.

THE 16TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 764 OF 1847.

IN the matter of the petition of Meghoo Hujjam, filed in this Court on the 8th December 1847, praying for the admission of a special appeal from the decision of Mirza Mohummud Sadik Khan, principal sudder ameen of Hazareebagh, under date the 8th September 1847; reversing that of the moonsiff of Hazareebagh, under date 13th April 1847, in the case of the petitioner plaintiff *versus* Goroopurshad Singh and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff sued for value of a crop cut and carried off by the defendants. He stated, that he had taken a *pottah* of 2 *biggahs* of land from the defendants, for the years 1900 and 1901 *Sumbut* Era; had enjoyed the produce of 1900; but that, when the crop of 1901 was ready, the defendants forcibly carried it off. The defence was, that the defendants had not *forcibly* carried off the crop; that the plaintiff had voluntarily relinquished the holding in 1901; and that such of the defendants, from whom the plaintiff had taken his *pottah*, had made arrangements letting it out to others, also included in this suit as defendants.

The moonsiff gave judgment for the plaintiff; but his judgment was reversed by the principal sudder ameen, who, after stating the issue in his decree correctly enough, refers entirely to the

proof upon another point. The main point at issue clearly was, whether the plaintiff had relinquished his holding in 1901 ; for the cutting the crop of that year was not denied by the defendants, the defence being that they had not *forcibly* cut it. The principal sudder ameen, however, decides the case solely upon the fact of cutting the crop, which he says is not proved, though the defendants virtually admit it ; and has not referred, when alluding to the evidence, to the relinquishment of the holding by the plaintiff, which is the real question at issue. Considering the decree of the principal sudder ameen to be very defective, I admit the appeal ; and remand the case to be tried by him *de novo*, with reference to the foregoing observations.

THE 16TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 246 OF 1846.

IN the matter of the petition of Kumrooddeen and others, filed in this Court on the 22d May 1846, praying for the admission of a special appeal from the decision of Niamut Ali Khan, principal sudder ameen of Tirhoot, under date 20th February 1846 ; reversing that of the moonsiff of Coely, under date 13th May 1845, in the case of Syud Fyz Ali and others, plaintiffs, *versus* the petitioners, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiffs, Syud Fyz Ali and Sheikh Wahid Ali, instituted this action to obtain registration, in succession to each other, of their names as proprietors of a 2 *anna* share of a village called Juddoo Mehtee. Syud Fyz Ali alleged, that he had purchased it from one Gholam Hyder, and had recently sold it to the other plaintiff, Sheikh Wahid Ali.

The defendants repelled the claim ; and alleged, among other things, that they had been in possession since the year 1231 F. S., (1824 A. D.) ; and as this action was instituted on 3d November 1843, the suit was barred by the rule of limitation.

It appears that one Gholam Hyder had, as guardian for his son, Shumsooddeen, sold 8 *annas* of *mouzah* Juddoo Mehtee, and 2½ *annas* of *mouzah* Maroonuggur to Fyz Ali. Two suits (one for each *mouzah*) were instituted by the buyer and seller against the present defendants, to obtain registration of the purchaser's name. That for the *mouzah* Maroonuggur was decreed in favor of the then plaintiffs ; but that for the *mouzah* Juddoo Mehtee was

struck off on default for want of prosecution : the former on the 22d March 1832, the latter on the 30th September 1833. The subject of the present suit is a 2 *anna* share of the *mouzah* Juddoo Mehtee, involved in the suit struck off on default.

The moonsiff dismissed the claim. The principal sudder ameen, in reversing the judgment of the moonsiff, observes, that the suit was brought within 12 years from the date of the order of dismissal on default in the former suit, and that, therefore, the action is not barred by the rule of limitation ; and, further, that as a decree has been given for a portion of the property contained in the deed of sale, it follows that the rest of the property conveyed by the same deed must be adjudged in the same manner.

The principal sudder ameen is clearly wrong in his calculation of the rule of limitation. The time must be taken from the date of the adverse possession of the opposite party,—the suit finally dismissed on default being no bar to the operation of the rule. The plaintiffs however say, that the parties from whom they derive their right have all along held an interest in the property, by the receipt of an allowance therefrom. These several points should have been fully enquired into by the principal sudder ameen, before he decided the case.

Again, the principal sudder ameen is wrong in his opinion, that the decision in regard to one part of the property must necessarily govern the course to be pursued in regard to the rest of the property, conveyed by the same deed. It is clear, that, under the circumstances exhibited in this case, the rule of limitation may apply to one part of the property, and not to another.

With reference to the foregoing remarks, I admit the appeal ; and remand the case for trial by the principal sudder ameen *de novo*.

THE 16TH MARCH 1848.

PRESENT :

SIR R. BARLOW, BART.,

JUDGE.

CASE No. 56 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, December 3d, 1844.

RAMKUNNAHEE NAUG AND RAMLOCHUN GHOSE,
(APPELLANTS,) DEFENDANTS,

versus

MUHARAJAH KISHEN KISHORE MANICK, (RESPONDENT,) PLAINTIFF.

Wuheel of Appellants—Sreenath Sein.

Wuheel of Respondent—Ameer Ali.

PLAINTIFF states, that, on the 25th November 1833, he obtained a summary decree against the defendants, under Regulation

7 of 1799, for *Sicca* rupees 4,189-6-12, which, with interest up to the date of plaint, amounts to Company's rupees 7,552-2. That, in realization of the summary decree, 14 rupees only had been recovered by sale of personals; and that as real property cannot be sold under a summary award, he now institutes this action, with a view to obtain a decree under Regulation 4, 1793, and, in execution of the same, to realize the balance due on the summary decree by sale of the defendants' real property.

The defendants, in answer, plead that the plaintiff has no claim against them. That plaintiff gave them a lease of *pergunnah* Juggutpoor, from 1241 to 1244, *Tipperah* era, i. e. from 1831 to 1834; that the plaintiff attached the *pergunnah* within a month and a half after he gave the lease, and held it to the close. That the sum of rupees 38,715-3, profits of the said lease, were demandable from the plaintiff, for which they had sued him in the zillah court. That, after the summary decree against them was passed, they had obtained a release from the plaintiff; that this document had been carried off in a robbery, but that it was proved before the collector when execution of the summary award was applied for, as well as the fact of the robbery.

The principal sudder ameen, on the 4th August 1840, decreed in favor of the plaintiff; because the defendants had not brought an action for the reversal of the summary award, within one year, as required by law. An appeal was preferred against this decision, and heard by Mr. Gordon, who, on the 13th December 1843, considered the judgment of the lower court, under the circumstances of the case, premature, and directed a re-trial of this case for the reasons he recorded: at the same time he ordered, that the suit, brought by the defendants against the plaintiff above referred to, should be simultaneously brought on and investigated.

In obedience to that order, the principal sudder ameen resumed the investigation of this suit; the case brought by the defendants against the plaintiff (No. 5286) having already been disposed of and dismissed, as appears from a *roobukaree* of the principal sudder ameen dated January 1841.

On re-trial, the defendants did not produce the deed of release, nor did they offer any evidence to prove the fact; satisfying themselves with filing copies of five depositions taken before the acting collector. The principal sudder ameen did not place any reliance on these depositions, which he considers at variance one with the other. He further discredited them, as the proper course for the defendants would have been to have caused the satisfaction of the decree to have been written off on the back of it, as proof of complete execution; for these, and other reasons, he again gave judgment in favor of the plaintiff, with costs, to the amount of rupees 7,552, with interest from date of plaint.

Against this decision the appellants have again come into court;

and urge that no account of collections, made by the respondent during attachment, was put in when the summary award was given against them : this plea the Court cannot, for a moment, admit. If they were dissatisfied with the collector's summary award, it was incumbent on them to sue for its reversal within one year, under the provision of Regulation 8 of 1831. This course, however, they did not adopt : there, therefore, can be no question as to the finality of the decree.

As they did not appeal against the dismissal of their suit for profits against the respondent, that decree is also final ; and it only remains for the Court, after review of the whole of the proceedings above referred to, to dismiss the appeal, with costs chargeable to the appellants.

THE 18TH MARCH 1846.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 609 OF 1846.

IN the matter of the petition of Wukeelooddeen, filed in this Court on the 29th August 1846, praying for the admission of a special appeal from the decision of the principal sudder ameen of Backergunge, under date the 30th May 1846; reversing that of the moonsiff of Bowfaul, under date the 24th December 1845, in the case of Mohummud Kamil, plaintiff, *versus* petitioner, Jyekishen Chung, and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff, on the 20th September 1845, sued to reverse a summary decision passed by the deputy collector, on the 28th January 1845, in favor of the petitioner, Wukeelooddeen, *versus* Jyekishen Chung, for balances up to *Aghun* 1251. The defendant (petitioner) pleaded that he held an *ousut huwaleh* within the plaintiff's *huwaleh*, which he got from him and his sharers on the 20th *Assar* 1251, and that Jyekishen was one of his *ryuts*. That the revenue authorities, on proof of balance, and on the strength of a *kuboolcut* given by Jyekishen, decreed in his favor.

The moonsiff dismissed the plaint, on the ground that the defendant (petitioner) had proved his possession and his *ousut huwalehdaree*

right, and upheld the summary proceeding. The principal sudder ameen reversed this decision, saying that the plaintiff had established his own possession of the lands as *huwalehdar*, and that no investigation could in this suit be made as to the *ousut huwalehdaree* right claimed by the defendant. Neither of these decisions are valid.

The plaintiff, estimating his action at 11 rupees 13 *annas*, sues to upset a summary decision. The defendant (petitioner) pleads a distinct *ousut huwalehdaree* right, within plaintiff's *huwaleh*; and the moonsiff enters upon the investigation, and decides the respective rights of the parties in the cause, which was not the issue before the deputy collector, the reversal of whose order is sought for in the plaint, and which could only be tried when brought before the courts on paper of proper value, and in due form. The defendant pleads that his *ousut huwaleh* comprises the entire of plaintiff's *huwaleh*, in which Jyekishen Chung is only one of numerous *ryuts*. The moonsiff, therefore, by awarding to the defendant, in a suit brought by plaintiff against him to set aside a summary proceeding, a proprietary right as *ousut huwalehdar*, has decided that which was not the issue of the case.

Again, the principal sudder ameen reverses the summary decision in favor of the defendant, on the ground that the plaintiff had the *huwaleh* in his own hands up to 1252; and that, consequently, the deputy collector's proceedings, awarding balance of 1251, cannot be upheld. He further refuses to enquire into the defendant's *ousut huwalehdaree* right in this case, and directs that a separate suit be brought for its establishment.

The parties before the deputy collector were Wukeelooddeen, claiming as *ousut huwalehdar* rents due by Jyekishen his *ryut*. The present plaintiff did not appear in that case; and as the *ryut's kuboolent*, and proof of balance were put in, the deputy collector could not but give a decision for the plaintiff before him. The reversal of this decision, without proof of some illegality, or irregularity, is therefore wrong.

The issue between the parties is clearly a question of right, which cannot be disposed of in an action of the nature now before the Court. It can only be determined when a suit is brought by either of the parties, on paper of proper value, for the purpose of establishing their respective rights. The Court, therefore, reverse the decisions of the lower courts; and direct that the case be returned to the moonsiff for retrial: he, the moonsiff, will restrict his investigation to the point at issue, viz. to the question whether the decision of the deputy collector was, or was not, legally correct; leaving the respective rights of the plaintiff and the defendant, Wukeelooddeen, to be adjudged when brought regularly before the courts. Costs charged to Mohummud Kamil, the respondent.

THE 18TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 149 OF 1847.

Special Appeal from a decision passed by E. Bentall, Esq., judge of Jessore, November 6th, 1846; altering a decree passed by the Principal Sudder Ameen, February 11th, 1846.

UDIT CHUNDUR SEIN, APPELLANT, (DEFENDANT WITH OTHERS,)

versus

RAM RUTTUN RAE AND OTHERS, RESPONDENTS,
(PLAINTIFFS.)

Wukeels of Appellant—J. G. Waller and Govind Chundur Mookenjee.

Wukeel of Respondents—Pursun Komar Thakur.

THIS case was admitted to special appeal, on the 25th February 1847, under the following certificate recorded by Mr. J. F. M. Reid :—

‘ This is a petition for a special appeal from the judge’s decision, printed in page 74 of the Jessore Zillah Decisions for 1846. The judge judicially determines, that the petitioner has no right to the contested property ; because, though called upon by the *roobukaree* of the principal sudder ameen, on the 17th November 1845, to produce his papers, yet he had not offered to do so on the 11th February 1846, when the suit was decided. I do not think the judge was justified in refusing the petitioner an opportunity of defending his right. The proceeding of the principal sudder ameen was not sufficiently explicit, to shew petitioner to what point he was to produce evidence. Had it been so, the courts cannot refuse a defendant the privilege of defending himself *for one default*, without calling on him a second time to file what the court may deem necessary. But, I doubt whether the principal sudder ameen considered it necessary for the petitioner to take any further measures: on the contrary, he appears to have thought it sufficient to approve of the compromise between the plaintiffs and Birj Kishore, and to leave the plaintiffs to adjust their difference with the petitioner and the other defendant, with the exception of Birj Kishore, by a new suit, or in any other

manner they thought proper. I would have sent back the case for retrial on the merits between plaintiffs and petitioner; but I doubt whether I can do so alone, and the pleaders of petitioner, (Mr. Waller and Govind Chundur) and the original plaintiffs, (Pursun Komar Thakur) seem inclined to take an order that the decision of the principal sudder ameen should be allowed to stand untouched. I admit the special appeal prayed for, to determine whether the principal sudder ameen's decision shall not stand untouched; or whether the case be remanded for a proper trial of the points at issue between the petitioner and the original plaintiffs.

The parties are willing that the decree of the principal sudder ameen should stand in all its parts. We accordingly annul the decree of the judge. The plaintiffs (special respondents) will pay the costs of this, and the judge's Court.

THE 18TH MARCH 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 121 OF 1847.

Special Appeal from a decision passed by J. French, Esquire, Additional Judge of Tirhoot, March 14th, 1845; confirming a decree passed by the Moonsiff of Dulsingserai, May 30th, 1844.

MR. JOHNSON, APPELLANT, (DEFENDANT WITH OTHERS,)

versus

SHEIKH GHOLAM HUZRUT, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Gholam Mohummud Khan.

Wukeels of Respondent—J. G. Waller and E. Colebrooke.

THIS case was admitted to special appeal, on the 14th January 1847, under the following certificate recorded by Mr. J. F. M. Reid:—

‘Sheikh Gholam Huzrut, as farmer on the part of Pheykun Chowdhree, the *putteedar* of 1-5th of *mouzah* Dowreassa, instituted this suit against Mr. Johnson and another, to recover rupees 294-13-6, the rent of certain indigo lands for 1242 F. S., and by a supplemental plaint against Mr. J. Thomson. While the case was pending, a *punchayt* was sitting to try what were the shares of Pheykun Chowdhree and his co-shares in the village. The moonsiff decreed 179-0-6 against Mr. Johnson alone. The *punchayt*, one month and

19 days after the decision of the moonsiff, determined the share of Pheykun Chowdhree to be but 1-4th of the 1-5th of the village. The judge was of opinion, that as the claim was for rents due 9 or 10 years before the award of the *punchayt*, it was not affected by the award, and confirmed the moonsiff's order.

'I think the petitioner is entitled to a special appeal, to try whether the plaintiff, who can represent but 1-4th of 1-5th of the village, can claim rent for the whole of the 1-5th part, and admit the appeal to try this point. As Thomson has been released from responsibility, I do not think the fact of his having been included by a supplementary plaint among the defendants, can affect the decision of the moonsiff. Had he been declared responsible, and himself objected to being brought in by a supplementary plaint, it would have been different.'

This is an action by a farmer against his tenant. The arbitration was between the share-holders of the property, and made at a period subsequent to the date of the first decree in this suit. Besides, it is not apparent what effect has been given to the arbitration award. The proprietors can assert their claims against each other; but, under the circumstances, the arbitration award is no bar to the present claim by the farmer against his tenant. We accordingly dismiss the appeal with costs.

THE 18TH MARCH 1848.

PRESENT:

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 197 OF 1846.

Special Appeal from a decision passed by the Judge of Zillah Midnapore, January 31st, 1845; amending a decree passed by the Principal Sudder Ameen, December 28th, 1843.

GOBURDUN GHOSE, APPELLANT, (DEFENDANT,)

versus

JOHN CALDER, RESPONDENT, (PLAINTIFF.)

Wukeel of Appellant—Gour Hurree Banerjee.

Wukeel of Respondent—Ramapurshad Raee.

THIS case was admitted to special appeal, on the 28th July 1846, under the following certificate recorded by Mr. Charles Tucker:—

‘ This plaint was instituted to recover Company’s rupees 2,237-13, principal, and rupees 1,331-3-3, interest thereon, balance of account between plaintiff and defendant on advances received for the provision of silk. The plaintiff came into court on the strength of a *kuboolcut*, alleged to have been executed by defendant on the 26th February 1839, which contains the terms on which the parties agreed to trade together : but this *kuboolcut* was rejected as not proved.

‘ The judge decreed in full for the plaintiff, but left the amount interest to be adjusted from the accounts of the parties.

‘ I consider the judge’s decision open to a special appeal on two points.

‘ *First.* He refused to give credit to the defendant for rupees 530, paid by him to the plaintiff’s head *gomashita* ; notwithstanding the defendant produced the plaintiff’s *perwannah*, addressed to him (the defendant) directing him to pay all monies to the said *gomashita*.

‘ *Secondly.* There was no agreement produced, binding the defendant to pay interest on the sums advanced by the plaintiff to him ; and therefore, I think, the principal sudder ameen was right, who rejected the demand, and only allowed interest on the balance due to the plaintiff from the date of the close of the account, when the trading transactions between the parties ceased. I admit the special appeal to try these two points.’

We observe that no receipts in proof of the payment of 530 rupees were filed ; and the judge, observing that the *gomashita* should in such case have been summoned by the defendant, refused to allow him credit for the amount. It is evident, therefore, that the judge did not consider the payment to be proved. We see no reason, in special appeal, to interfere with his order upon this point.

In regard to the second point, we consider it right to allow the plaintiff interest only from the date of his suit (17th May 1842.) He will recover his principal, together with interest thereon from the date of suit to the date of the judge’s decree, and interest upon the consolidated principal and interest from that date to the date of payment. Costs to be paid by the parties rateably, in proportion to that decreed by the defendant, and in proportion to that dismissed by the plaintiff.

THE 18TH MARCH 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.

TEMPORARY JUDGE.

PETITION No. 873 OF 1845.

IN the matter of the petition of Radha Mohun Ghose, filed in this Court on the 22d December 1845, praying for the admission of a special appeal from the decision of the judge of zillah Jessore, under date the 19th September 1845 ; reversing that of the principal sudder ameen of that district, under date 8th April 1843, in the case of Radha Mohun Ghose, plaintiff, *versus* Raja Burdakaunth Raee, defendant.

In this case the defendant, Rajah Burdakaunth Raee, did not appear in the lower court ; but he, alone of the several defendants, appealed to the judge, who reversed the decision of the lower court.

This is opposed to the practice indicated in the Circular Order of the 12th March 1841. We therefore admit the special appeal ; and remand the proceedings to the judge to be disposed of under the Circular Order in question. Should the reasons assigned by the rajah for his default, in neglecting to attend in the lower court, prove satisfactory, the judge will then return the record to the lower court, there to be disposed of, in the first instance, in presence of the rajah, or his representative.

THE 18TH MARCH 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 872 of 1845.

IN the matter of the petition of Ramruttun Ghose, filed in this Court on the 22d December 1845, praying for the admission of a special appeal from the decision of the additional judge of zillah Hooghly, under date the 28th August 1845 ; reversing that of the principal sudder ameen of that district, under date 16th December 1844, in the case of Umbikachurn Mookerjee, plaintiff, *versus* Ram Ruttun Ghose, and others, defendants.

This case had reference to lands held rent-free ; and, after institution, was sent to the collector for report. After some time, the collector returned the proceedings, stating that the plaintiff had not produced any documents before him to substantiate his claim to hold the lands rent-free.

Shortly after, the plaintiff appeared before the principal sudder ameen with his documents, explaining that his *mookhtars* had not given him notice that documents had been called for, on which the case was remanded to the collector for report. As it does not appear that any enquiry was made as to the validity, or otherwise, of the reasons assigned by the plaintiff for not producing his documents before the collector in the first instance, we annul the decisions of the lower courts ; and, admitting a special appeal, remand the proceedings, with directions that the case be restored to the file of the principal sudder ameen, who will take evidence on the point, and proceed to dispose of the case *de novo*.

THE 19TH MARCH 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

W. B. JACKSON, and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 153 OF 1846.

Regular Appeal from a decision of Mynooddeen Sufdur, Principal Sudder Ameen of Zillah Hooghly.

RAMDHUN MOOKERJEE, (APPELLANT,) DEFENDANT,
versus

MUSST. SREEMUTTEE DIBBEA, WIDOW OF LUKHEE
NURAIN GHOSAL, (RESPONDENT,) PLAINTIFF.

Wuheel of Appellant—Gour Huree Banerjee.

Respondent—Defaulting.

APPEAL laid at Company's rupees 194, 2 annas, on account of costs of suit.

The respondent was plaintiff, and instituted the suit against appellant. Having defaulted, by not filing her reply within 6 weeks, her suit was dismissed by the principal sudder ameen under Act 29, 1841 ; and as plaintiff was a pauper, the stamp fees due to Government were remitted, and the fees of their pleaders, to the extent of 1-4th, made payable by each party respectively. Against this latter part of the decision, the appellant preferred this appeal, contending that under Section 2, Act 29, 1841, his expenses should have been laid on plaintiff.

The Court, under Section 2, Act 29, 1841, reverse that portion of the principal sudder ameen's decision which made the appellant's (defendant's) pleader's fees payable by him ; and decree that they be paid by the respondent (plaintiff). Costs of appeal, in full, payable by respondent.

THE 22D MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 724 OF 1847.

IN the matter of the petition of Sheikh Waizooddeen Hosein, filed in this Court on the 18th November 1847, praying for the admission of a special appeal from the decision of Moulvee Niamut Ali Khan, principal sudder ameen of Tirhoot, under date the 23d August 1847; affirming that of the moonsiff of Bhowara, under date 31st July 1845, in the case of Mohun Lal Thakur and others, plaintiffs, *versus* Bibi Bhobun, and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiffs sued for possession of certain lands in right of purchase from the defendants, which the defendants denied. The moonsiff gave judgment for the plaintiffs. During the appeal stage, the rights and interests of one of the defendants were sold in execution of a decree, and purchased by the present petitioner, who then applied for permission to represent the party whose interests he had purchased. This was at first permitted, and time allowed him to proceed with the appeal ; but, subsequently, the principal sudder ameen dismissed the appeal, on the ground that the petitioner could not proceed with it.

The principal sudder ameen is clearly wrong, as the petitioner occupies the place of the party whose rights he purchased. I accordingly admit the appeal, and remand the case, in order, that the principal sudder ameen may decide it on its merits, allowing the petitioner to proceed with his appeal in the usual course.

THE 22D MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 695 OF 1847.

IN the matter of the petition of Puddum Konwur Race Chowdhree, filed in this Court on the 11th November 1847, praying for the ad-

mission of a special appeal from the decision of Syud Fuzl Rubbi Khan, principal sudder ameen of East Burdwan, under date the 19th July 1847; reversing that of the moonsiff of Madhopore, under date 15th December 1846, in the case of Gooroochurn Mullick, plaintiff, *versus* the petitioner and others, defendants.

It is hereby certified that the said application is granted on the following grounds:—

It is unnecessary to enter into any details in regard to this case, which was struck off by the principal sudder ameen under Act 29, 1841, in consequence of the plaintiff's neglect to proceed. The principal sudder ameen has, however, saddled the defendant with his own costs, which is directly opposed to the provision of Section 2, Act 29, 1841. I accordingly admit the appeal; and under Clause 2, Section 2, Regulation 9, 1831, remand the case, in order, that the principal sudder ameen may amend his order in conformity to the provisions of the Act cited.

THE 22D MARCH 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

CASE No. 301 OF 1844.

Regular Appeal from a decision passed by F. Stainforth, Esq., Judge of Chittagong, August 29th, 1844.

TARNEE SHUNKER CANOONGOE, APPELLANT, (PLAIN-
TIF,) .

versus

COLLECTOR OF ZILLAH CHITTAGONG AND PREM-
CHAND, AUCTION PURCHASER; THEN LALCHUND CHOW-
DHREE AND MUSST. CHUNDUR BULLEE, RESPONDENTS,
(DEFENDANTS.)

Wukeels of Appellant—Usmut Oolla and Aftaboodeen.

*Wukeels of Respondents—Pursun Komar Thakur and Gholam
Sufdur.*

APPEAL laid at rupees 6,987-8-6, to cancel an auction sale by the collector of *turuf* Gouree Churn, on account of arrears of Government revenue.

The decision of the judge is as follows:—‘The point to be decided in this case, is, whether at the time of the sale of *turuf* Gouree Churn there was, in the collector's treasury, a sum of surplus money belonging to the plaintiff, sufficient to cover the balance due to Government on account of *turuf* Gouree Churn. It appears that the Board of Revenue directed the return to plain-

tiff of rupees 558-3-12-3, illegal fine, on account of balance of *talooka* Bindrabun Canoongoe: after this, *turuf* Gouree Churn was sold for a balance of revenue amounting to rupees 512, exclusive of interest.

‘ There is no proof that the plaintiff applied to the collector to transfer the above sum. In the petition of plaintiff’s wife to the commissioner, dated the 1st of May 1837, she made no mention of this claim; but when plaintiff appealed to the Board of Revenue, on the 24th May, this claim was brought forward. The collector in a report to the commissioner, dated 10th June 1837, states that the plaintiff’s claim was without foundation, and that the sum claimed had been carried to his credit on account of balance due for *talooka* Bindrabun. After the return of this case from the Sudder Dewanny Adawlut for further investigation, the collector was called upon to shew when the amount of rupees 558 was transferred to *talooka* Bindrabun. In reply, the collector files several *khurchah* accounts of *talooka* Bindrabun for 1228-9, &c. From these papers it appears, that the sum disputed by plaintiff was credited, in liquidation of the balance of *talooka* Bindrabun, on account 1228 and 1229, but on what date this transaction took place does not appear.

‘ In my opinion, this point, whether the transaction took place before, or after the sale, is difficult of determination, and is of little consequence to the case. It appears from a statement of balance due on account of *talooka* Bindrabun, that the plaintiff was in balance for the year 1229 B. 602 rupees, for 1230 B. 84 rupees, and for 1231 B. 917 rupees. If he had applied to the collector to make the transfer, the collector would have been justified in refusing the request, so long as he was in balance on account of *talooka* Bindrabun; and the plaintiff must have been aware of this, otherwise he would have applied to the collector and to the commissioner for the transfer. The sale of *turuf* Gouree-churn was legal; and the claim of the plaintiff must be dismissed. The costs of court to be borne by the plaintiff.’

The appeal rested mainly on these pleas:—*first*, that a sum more than sufficient, belonging to appellant, was in the collector’s hand to pay up the arrear for which the property was sold; *secondly*, that appellant’s agent, or *mookhtar*, petitioned before the sale, to have it appropriated to that purpose, but his prayer was rejected, and the property wantonly sold; and, *thirdly*, that this plea had been urged before the Sudder Board which was sufficient.

The respondents denied that there was any sum due to appellant at the time of the sale, as the amount in deposit to his credit had been appropriated to the liquidation of arrears due by him on account of another estate; and that he had never applied to the collector as he averred. The respondent’s pleaders further con-

tended, that the plea not having been urged before the commissioner, could not now be heard.

The law,—Section 25, Regulation 11, 1822,—declares, that the court shall not admit any plea, unless the same shall have been urged by the party in his petition to the Board, or other authority exercising the powers of that Board: and respondent's pleaders contend, that as under Section 4, Regulation 1, 1829, the powers of the Board were vested in the commissioners, the plea must be urged before the commissioner. It is however to be observed, that when Regulation 11, 1822, was enacted, the Board of Revenue was the highest revenue authority under the Government; and, consequently, the intent of the legislature was clearly that at least the highest authority should be petitioned to consider the plea, before resort to a court of justice: now, the commissioners are not the highest authority, as they are subject to the Sudder Board. In the opinion therefore of the Court, the intent of the law is fulfilled when the plea is urged before the Sudder Board, and the plea must be admitted.

The evidence supplied by the collector, to shew that the deposit in question had been appropriated to the liquidation of other arrears due by appellant, is not sufficient or satisfactory, and the case must have been remanded again for further enquiry.

The appellant, however, has failed to prove, that he, or his agent, did petition the collector to appropriate the deposit to the liquidation of the arrear for which the sale under dispute was enforced: the Court therefore dismiss the appeal with full costs.

THE 22D MARCH 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

CASE No. 311 of 1844.

Regular Appeal from a decision passed by F. Stainforth, Esq., Judge of Chittagong, August 29th, 1844.

PREM CHAND, THEN LAL CHAND, BROTHER AND HEIR,
APPELLANT, (DEFENDANT,)

versus

TARNEE SHUNKUR CANOONGOE, RESPONDENT,
(PLAINTIFF.)

Wukeel of Appellant—Gholam Sufdur.

Respondent—defaulting.

APPEAL laid at 579-7-0, costs of suit.

This is an appeal from the same decision as the above, in consequence of the whole of the costs not having been awarded against respondent, whose suit had been dismissed.

On perusal it appeared that the vernacular translation of the judge's decision differed, with regard to the costs, from the original in English. The case is therefore remanded for the discrepancy to be corrected in accordance with the order in the English original, and the practice of the courts in adjusting costs.

THE 23D MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE.

PETITION No. 253 OF 1846.

IN the matter of the petition of Genda Lal, filed in this Court on the 27th May 1846, praying for the admission of a special appeal from the decision of the judge of zillah Sarun, under date the 27th February 1846; reversing that of the moonsiff of Pursa, under date 22d December 1845, in the case of Genda Lal, plaintiff, *versus* Degumber Purshaud and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

In this case the petitioner having obtained a decree in his favor in the moonsiff's court, the decision was reversed in appeal without summoning him, the respondent, which being in contravention of the law, I admit the special appeal applied for; and, remanding the proceedings under the provisions of Clause 2, Section 2, Regulation 9, 1831, direct that the appellate court replace the case on its file, and after summoning the respondent, dispose of the case *de novo*.

THE 23D MARCH 1848.

PRESENT :

A. DICK, Esq.,

JUDGE.

CASE No. 69 OF 1845.

*Regular Appeal from a decision of the Principal Sudder Ameen of
Zillah Rajshahye, Moulvee Abdool Ali Khan.*

SHUREETOOLA CHOWDHREE, KUREEM BUKHSH
CHOWDHREE, FUKHUROODEEN AND MOHUMMUD
AHUSSUN CHOWDHREE, APPELLANTS, (PLAINTIFFS,)

versus

DEPUTY COLLECTOR OF PUBNA, NUND KOOMAR
RAEE, SHEEB INDUR BUTTACHARJ, LUKHEE MUN-
NEE DIBEEA, WIDOW OF KALA CHAND BABOO AND
OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeels of Appellants—J. G. Waller and Abas Ali.

*Wukeels of Respondents—Pursun Komar Thakur, Gholam Sufdur,
and Bunsee Buddun Mitr.*

APPEAL laid at Company's rupees 97,325-8-0, to cancel an auction sale by the deputy collector, for balance of Government revenue.

The principal sudder ameen dismissed the suit, which was founded on several grounds, commenting upon them all as untenable ; as fully detailed in his decision.

In appeal, the *first* point contested, was the right of appellants to institute the suit after the larger portion of the purchase money had been received by the proprietors, or appropriated on their account.

On the part of appellant it was contended, that under Section 27, Regulation 11, 1822, only the person, or share-holder, who had received a portion of the purchase money was precluded from suing ; and his conduct could not affect the rights of others, as that would be manifestly unjust, and might, and would, lead to divers frauds. On the other hand, for respondents, it was urged, that the words ' no person,' in the Section above cited, must be construed to indicate the whole proprietary, whether one or many ; and as the whole of a joint estate was sold, though only one share-holder was in arrear, so if one share-holder received any portion of the purchase money, the validity of the sale could not be contested by the other share-holders : all being responsible for the act of the one. This point the Court thus decided. Throughout our Regulations, the proprietary of estates, whether single or joint, is considered as one whole ; therefore the words ' no person,'

in the Section in question, must be held to mean no proprietary, whether consisting of one sole proprietor, or of several shareholders; but, as only all the parts can form the whole, so only all the shareholders can constitute the proprietary: and then, if any one of the shareholders has not received his share, the proprietary has not. Consequently, the right to sue to contest the validity of a sale is forfeited, only when the whole of the proprietary have received any portion of the purchase money,—no portion of which can be legally paid to, or on behalf of any one or number of the shareholders, except on the receipt, or with the consent, of the whole.

The *second* point then argued was, whether the appellant, Fukhuroodeen, was, or was not, a share-holder, such as entitled him to prefer this suit, he not having received any portion of the purchase money. His pleaders were unable to produce any proof to establish his assertion, that though his father, (whose name still appeared on the collector's registry as proprietor,) had given the share to his sisters, he had given them in exchange another property, and was himself the owner; whereas, the respondents had filed strong documentary evidence to shew, that the sisters were the share-holders. On this it was held by the Court, that Fukhuroodeen had no right to sue or appeal. It was admitted that the other two appellants had, through their agent, or *mookhtar*, received their portions of the purchase money, and could not consequently sue, having disregarded the law. Therefore appeal dismissed with full costs.

THE 23D MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 570 OF 1847.

IN the matter of the petition of Kalikunth Buttacharj, filed in this Court on the 4th September 1847, praying for the admission of a special appeal from the decision of Mr. C. Mackay, principal sudder ameen of Mymensingh, under date the 4th June 1847; reversing that of the sudder ameen of that district, under date the 21st April 1846, in the case of Roychund Raee Chowdhree, plaintiff, *versus* the petitioner, and others, defendants.

It is hereby certified that the said application is granted on the following grounds:—

This was a suit for real property, which was dismissed by the sudder ameen. After this decision, the record of the case was destroyed by a fire, which burnt down the sudder ameen's court

house. The principal sudder ameen reversed the decree of the lower court, upon such papers as he had before him.

The principal sudder ameen should have held a proceeding calling upon both parties to file copies of such papers as they might have in their possession, and also have examined any previously examined witnesses the parties might have wished to have recalled, so as to proceed upon the best evidence procurable.

As he failed to do this; and as, consequently, his investigation has been very meagre and unsatisfactory, I admit the appeal, and remand the case for trial *de novo*, with reference to the foregoing remarks. The principal sudder ameen will not consider himself bound, by the foregoing order, to limit the parties to the proof adduced in the court of first instance, should he see any good ground for admitting additional evidence.

THE 23D MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 710 OF 1847.

IN the matter of the petition of Musst. Ameena, filed in this Court on the 11th November 1847, praying for the admission of a special appeal from the decision of Syud Ibrahim Khan, principal sudder ameen of Behar, under date the 30th July 1847; reversing that of the moonsiff of Arungabad, under date 22d March 1847, in the case of the petitioner, plaintiff, *versus* Tufuzzul Hosein, and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The petitioner sued for recovery of possession of a fractional portion of a 2 *anna* share of the village of Mahowawan, alleging that the 2 *anna* share was the acquired property of her brother, Sujiduddeen, who was drowned by the upsetting of a boat; that he left as his heirs, his mother Jan Bibi, his brother Tufuzzul Hosein, and his sister the plaintiff. That upon the death of Sujiduddeen, his heirs entered upon joint possession; but that upon the plaintiff going to her husband's house in 1246 F. the defendants withheld her share of the profits of the estate, and thus ejected her.

The defendant, Tufuzzul Hosein, did not deny in the lower court that the facts in regard to the acquisition of the property by Sujiduddeen were true; but alleged that Sujiduddeen was still alive, though he had not been heard of for many years.

The moonsiff gave judgment for the plaintiff. His decision was reversed by the principal sudder ameen, who observes that plaintiff sued as heir to Sujiduddeen; that his death was not proved. That

under the Mahomedan law no suit for his estate would lie under a period of 90 years ; and that, consequently, the plaintiff's claim must be dismissed.

In admitting this appeal, an expression of surprise at the mode of disposal of this case by the principal sudder ameen seems to be called for.

The plaintiff alleged, that on the death of Sujiduddeen, his heirs, including the plaintiff, entered upon joint possession. This was a most material point for the principal sudder ameen to investigate, but he has not touched it. If the heirs took possession, it does not appear upon what ground one of the heirs could oust another, and then plead in court that Sujiduddeen might be yet alive. It is further urged, that Tufuzzul Hosein has sold this property to another person, and this is not denied,—in fact, is admitted by Tufuzzul Hosein himself. It is not easy to perceive how he could sell the property of Sujiduddeen, and then plead that Sujiduddeen was still alive.

The points for enquiry clearly were :—*first*, whether the property was that of Sujiduddeen ; and, *secondly*, who were his heirs, and what their shares. The plea of his being alive, was inadmissible on the part of one holding in succession to him.

With reference to the foregoing remarks, I admit the appeal, and remand the case for trial *de novo*.

THE 23D MARCH 1848.

PRESENT :

C. TUCKER, Esq.,

JUDGE ; and

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 793 OF 1847.

IN the matter of the petition of Musst. Kashipreea, and others, filed in this Court on the 27th December 1847, praying for the admission of a special appeal from the decision of the principal sudder ameen of Dacca, under date the 11th September 1847 ; altering that of the sudder ameen of Dacca, under date 30th August 1845, in the case of the petitioners, plaintiffs, *versus* Bulram Baboo, and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

This was an action for arrears of rent, decided by the sudder ameen in favor of the plaintiffs. On appeal, the principal sudder ameen modified the judgment of the court of first instance. He

awarded to the plaintiffs the principal sued for, but gave interest only from the date of action; citing Act 32, 1839, as his authority. It is against the order, in regard to interest, that the plaintiffs now apply for permission to prefer a special appeal.

Act 32, 1839, authorizes the courts to award interest in certain cases, in which it is not awarded by express law, or recoverable by express stipulation. The concluding sentence of the Act shews that it was not intended to apply to cases in which interest was payable by law at the time of its enactment. As interest upon balances of rent is recoverable both by law and the uninterrupted practice of years, the provisions of Act 32, 1839, are altogether inapplicable to the case.

We accordingly admit the appeal; and remand the case under Clause 2, Section 2, Regulation 9, 1831, in order, that the principal sudder ameen may pass orders in conformity to law in regard to the interest.

THE 23D MARCH 1848.

PRESENT:

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 597 OF 1847.

IN the matter of the petition of Ramsouder Raee, filed in this Court on the 18th September 1847, praying for the admission of a special appeal from the decision of Syud Ahmud Bukhsh Khan, principal sudder ameen of Rungpore, under date the 19th June 1847; altering that of Mr. Thomas, the sudder ameen of that district, under date the 10th March 1846, in the case of the petitioner, plaintiff, *versus* Bhooloo Sircar and others, defendants.

It is hereby certified that the said application is granted on the following grounds:—

The plaintiff, who is an auction purchaser of an estate sold for arrears of revenue, sues to assess certain lands in the possession of the defendants, which they claim to hold partly at fixed rents, and partly as *lakhiraj*.

The sudder ameen gave judgment for the plaintiff in regard to the lands which the defendants claimed to hold at fixed rents, leaving him to a separate action for the resumption of the *lakhiraj* lands.

On appeal by the defendants, the principal sudder ameen reversed the decree of the sudder ameen. He has entered into a long recital of a quantity of evidence to show that the defendants have held the lands at a fixed rent for a number of years; but he has not considered this evidence with respect to such parts of Regulation 8, 1793, and other enactments, which refer to *mocurrurree*

tenures; nor has he recorded any opinion as to the legal effect of such evidence, with reference to the law which declares what is essential to the validity of such tenures.

There is another point in this case, which of itself forms sufficient ground for the admission of a special appeal. The genuineness, or otherwise, of some most material documents appears from the decree of the principal sudder ameen, to depend upon the genuineness of the signature of a public officer attached to them. The principal sudder ameen is ignorant of the English language; and, in order to meet the difficulty, he sends for the writer of the judge's office, submits the papers to his examination, and acts upon his opinion, reversing the judgment of his subordinate, who is conversant with English, and could judge of the documents for himself. When this difficulty presented itself, the principal sudder ameen should have reported the case to the zillah judge for his decision, instead of proceeding with it himself.

Under these circumstances, I admit the special appeal, and remand the case for trial *de novo* by the zillah judge.

THE 23D MARCH 1848.

PRESENT :

R. H. RATTRAY, Esq.,

JUDGE.

PETITION No. 796 OF 1846.

IN the matter of the petition of Waiz Ali and Musst. Ameerun, his wife, filed in this Court on the 23d October 1846, praying for the admission of a special appeal from the decision of Mohummud Ibrahim Khan, second principal sudder ameen of the city of Patna, under date the 29th June 1846; affirming that of Ahmud Bukhsh, sudder ameen of the said city, under date the 28th January 1846, in the case of Zeeshan Hosein, plaintiff, *versus* Waiz Ali and others, defendants.

It is hereby certified that the said application is granted on the following grounds :—

The plaintiff sued for a sixth share of certain lands and other property, as set forth,—the same having been the estate of Musst. Chukun, deceased, his paternal grandmother. The original proprietor, Syud Zaeer Hosein, he states had been succeeded on his death, in 1234 Fuslee, by Musst. Chukun, his (Zaeer Hosein's) maternal grandmother, and Waiz Ali, his father, (the petitioner) : the former receiving one share, and the latter five shares of the estate. That he (plaintiff) having been a minor at the time of his grandmother's demise, his mother (Musst. Shurfeen) took charge of his interests, and for a certain time was permitted by Waiz Ali to conduct the management, and receive the rents of his (plaintiff's) portion unopposed; but that at last he interfered, and withheld

every thing; and plaintiff, now of age, can get neither land nor rent: therefore this suit is brought to obtain his right.

The defendant, Waiz Ali, denies the claim of the plaintiff, on the ground of the property sued for as the estate of Musst. Chukun, never having belonged to her. She was a *Sheea*, and, as such, could not have inherited any portion of the estate of Zaeer Hosein, which estate had been held by him, Waiz Ali, for 18 years; and consequently, the action now brought was barred under the statute of limitation.

The sudder ameen states, that certain witnesses have deposed to the plaintiff being a *Soonee*; and that, besides this, the doctrines of the *Sheea* sect are never admitted in legal practice, and he adjudges the property accordingly. The principal sudder ameen concurs, and affirms the judgment.

As regards the *first* point, I do not think the plea of the defendant has been satisfactorily determined. The question to be decided was the legal right of Musst. Chukun to the inheritance, on the death of Zaeer Hosein. If she had none, the plaintiff can have none; for his is avowedly dependant upon her's. In respect to the *second*, the concluding sentence of the judgment passed in the case of Rajah Deedar Hosein *versus* Ranee Zuhoorun Nissa on the 12th August 1822, (to be found at page 168, volume III of the Sudder Dewanny Adawlut Reports,) is one of many proofs of the fact being mis-stated. Admitting this appeal therefore, I direct that the case be returned for revisal and disposal after a due enquiry into, and consideration of, the pleas of the petitioners, not hitherto sufficiently investigated.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 281 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, September 12th, 1845; amending a decree passed by the Moonsiff of Kashigunge, May 15th, 1845.

MUHUBUT KHAN, APPELLANT, (PLAINTIFF,)

versus

POORBANUND MEHTEE, AND ANOTHER, RESPONDENTS,
(DEFENDANTS.)

Wuheel of Appellant—Nilmoney Banerjee.

Respondents—defaulting.

THIS case was admitted to special appeal, on the 31st May 1847, under the following certificate recorded by Mr. C. Tucker:—

‘The plaintiff sued the defendants for possession of 10 *biswas* of rent-free land, included in a parcel containing 2 *biggahs*, which he purchased from them on 22d *Jeyte* 1234 *Umlee*; and of which 10 *biswas* he alleged the defendants dispossessed him, by cutting and carrying away the crop thereon, on 4th *Aughun* 1252 *Umlee*.

‘The defendant, Poorbanund, denying the dispossession, admitted the sale to the plaintiff; but added, that at the date of sale the other defendant, Kishnanund Mehtee, his brother, was only 11 years and 7 months old.

‘The moonsiff decreed for the plaintiff. On appeal the principal sudder ameen, admitting the evidence established the plaintiff’s occupancy from the date of his purchase,—a period of about 18 years,—decreed to plaintiff 5 *biswas*, and 5 *biswas* to Kishnanund, because the sale as affecting him was not valid.

‘This is irregular and illegal both. The suit was for possession of land, of which the plaintiff alleged he had been dispossessed by the defendants; he proved this and an occupancy of 18 years. The principal sudder ameen should have restored him possession, leaving Kishnanund to sue to recover his rights if he chose to do so; but it is clear that upwards of 12 years had elapsed since Kishnanund came of age, and yet he has never sued the plaintiff to contest the sale of his share of the property by his brother. I admit the special appeal on both points.’

The respondents did not appear. For the reasons stated in the above certificate, we amend the decision of the principal sudder ameen, and affirm that of the moonsiff. All costs chargeable to the respondents.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 157 of 1847.

Special Appeal from a decision passed by the Judge of Zillah Mymensingh, June 11th, 1845; confirming a decree passed by the Moonsiff of Kagmaree, February 26th, 1845.

SHEIKH MUNNA, APPELLANT, (PLAINTIFF,)

versus

GOOROOPURSHAD BHOOMIK AND OTHERS, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Taruk Chundur Raee.

Respondents—defaulting.

THIS case was admitted to special appeal, on the 15th February 1847, under the following certificate recorded by Mr. Charles Tucker :—

‘In this case the petitioner (appellant) sued Gooroorpurshad Bhoomik and Ram Indur Nurain Chowdhree, *talookdars*, and Bydenath Pal and Callynath Deb, farmers on their part, for attaching his property under Regulation 7, 1799, for a balance of rent, which he alleged to be not due from him. The *talookdars* had let their estate in farm for the years 1250 and 1251.

‘In the adjustment of accounts, the petitioner produced a receipt for 12 rupees 8 *annas*, signed by the two *talookdars*, which was acknowledged and admitted by Gooroorpurshad Bhoomik. The lower courts refused to give the petitioner credit for this sum.

‘I admit the special appeal, to try whether the petitioner was not entitled to a decree against Gooroorpurshad, for the amount of the receipt acknowledged by him.’

This action was instituted by the plaintiff, in consequence of his having been compelled to pay a sum of money to save his property from sale, when attached under Regulation 7, 1799. The suit is in the form of a money action to recover the surplus paid by him, and has been instituted against the zemindars and their farmers. As one of the proprietors, Gooroorpurshad Bhoomik, admits having received 12 rupees 8 *annas* from the plaintiff, for which the latter has not received credit, he is clearly entitled to recover that amount from the party to whom he paid it. We accordingly amend the decrees of the lower courts. The plaintiff will recover the sum of 12-8 from Gooroorpurshad Bhoomik, with interest thereon from the date of action to this date, and interest on the consolidated principal and interest from this date to the date of payment. Gooroorpurshad, the defendant, will be charged with the plaintiff's costs in proportion to the amount decreed against him incurred in the first and second courts, and with the whole of the costs in this Court.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 156 OF 1846.

*Special Appeal from a decision passed by the Judge of Dacca,
June 26th, 1844 ; reversing a decree passed by the Acting Moonsiff
of Phoolgacha, September 16th, 1843.*

*KALEE SHUNKUR PAL, AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

MUSST. PHOOL MALA, AND OTHERS, RESPONDENTS,
(DEFENDANTS.)

Wukeel of Appellants—Rampran Race and Bunsee Buddun Mitr.

Wukeel of Respondents—Taruk Chundur Race.

THIS case was admitted to special appeal, on the 28th March 1846, under the following certificate recorded by Messrs. Tucker and Reid and Sir R. Barlow :—

‘The judge threw out this case under the statute of limitations, in consequence of the plaintiffs’ dispossession in 1819 ; but the application pleads Construction 980, and shews that by a decree of this Court, dated 23d July 1838, the property in question was declared to be the joint acquisition of four brothers, of whom the plaintiffs are the descendants of one brother, and the defendants of another : hence the decree in question virtually recognized the right of the plaintiffs, incident to their heirship, to one of the brothers, so that this suit, having been brought in January 1842, is within the prescribed period. The Court admit a special appeal to try this point.’

It appears from the records of this case, that Sham Das Pal, Sooderam Pal, Sobharam Pal, and Ram Das Pal, were four brothers, living together as a joint undivided family. On the 26th June 1829, Ram Kunhai Pal, the daughter’s son of Ram Das Pal, sued the heirs of the other three brothers for a four *anna* share of sixty-four *talooks* and *huwalehs*, including an estate named *Joar Kolartullee*. It was admitted that sixty-three of the *talooks* had been the joint property of the brothers ; but the *whole* of the defendants answered, that *Joar Kolartullee* had been acquired solely by Sobharam, the third brother.

The case, after passing through the courts of the principal sudder ameen and zillah judge, was finally decided by the Sudder Dewanny Adawlut, on 23rd July 1838, in favor of the plaintiff Ram Kunhai Pal; the decree awarding to him a four *anna* share of the whole sixty-four *talooks*, *huwalehs*, &c., including *Joar Kolartullee*.

This suit was then instituted, on the 21st March 1842, by the heirs of Sham Das Pal, against the heirs of Sobharam Pal, to recover what they called their four-*anna* share of *Joar Kolartullee*, which, in their answers to the suit of Ram Kunhai Pal, they declared to have been the sole acquisition of Sobharam. The papers in this suit, as well as their own answers in the former case, shewed that they had not held possession of the property in any way for a period considerably exceeding 12 years.

The principal sudder ameen proceeding upon the decree of the 23rd July 1838, gave judgment in favor of the present plaintiffs; but his judgment was reversed by the judge, on the ground that the suit was barred under the law of limitation, as laid down in Section 14, Regulation 3, 1793.

The certificate of admission of this special appeal, raises the question of whether this suit is admissible under Construction 980.

The Construction cited declares the law in regard to the applicability of the rule of limitation to certain cases, provided for in Sections 15, 26, 32, and 35, Regulation 22, 1795. The cases are altogether of a peculiar character, and the Regulation itself is not in force in the districts under the jurisdiction of this Court. Certain zemindars had been dispossessed prior to the 1st July 1775, the date of the cession of the province of Benares to the Company. The civil courts were prohibited, by a Regulation passed by Government on the 11th April 1788, from taking cognizance of claims to lands and zemindars' rights, where the party had been dispossessed antecedent to the date of cession; but by a new rule, passed on the 5th June 1791, it was declared that possession within the limited period of any one or more of the *putteedars*, or sharers, was to entitle to restoration all the other persons having a right to claim as *putteedars*. By an express provision the possession of one sharer was declared to be emblematical of the possession of all the sharers, for the time prior to the date of the decree in favor of the one *putteedar*. The Construction holds, however, that the claim of *putteedars* is subject to the general rule of limitation from the date of the decree awarding the right of one *putteedar*: it is altogether restrictive in its object; and cannot be extended to claims under the *Hindu* and *Mahomedan* laws of inheritance, in regard to which provisions, similar to those in the cases of the dispossessed zemindars, provided for by Regulation 22, 1795, do not exist. We are accordingly of opinion, that the Construction cited does not in any way apply to the case before us.

As it is clear from the record, that the defendants have held adverse possession of the share of *Joar* Kolartullee, now sued for, for a period considerably exceeding 12 years prior to the institution of this suit; and as the decree of the 23d July 1838 was limited in its terms and in its execution to the claim only of the then plaintiff, whose right was then denied by both parties to the present suit, on the ground that the disputed *Joar* was the acquisition of Sobharam solely, we dismiss the appeal, confirming the decree of the zillah judge, with all costs against the special appellants.

THE 25TH MARCH 1848.

PRESENT:

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

• CASE No. 197 OF 1844.

Regular Appeal from a decision passed by Moulvee Abdool Ali, Principal Sudder Ameen of Rajshahye, April 22d, 1844.

PARBUTTEE SUNKUR MUJMOODAR AND HURSUNKUR MUJMOODAR, GUARDIANS OF BURDA SUNKUR AND KALEE SUNKUR MUJMOODARS, MINOR SONS OF TARNEE SUNKUR MUJMOODAR, APPELLANTS, (DEFENDANTS,)

versus

SHIB SOONDREE DASSEE, WIDOW OF BISHENNATH SHAH, AND MOTHER OF RAMRUTTUN SHAH, MINOR, RESPONDENT, (PLAINTIFF,)
JYESUNKUR MUJMOODAR, RESPONDENT, (DEFENDANT.)

Wikeel of Appellants—Bunsee Buddun Mitr.

Wikeel of Respondents—Moulvee Looft-ur Ruhman.

THIS plaint was filed on the 23d January 1843, or 11th *Maugh* 1249. The plaintiff states, that Jyesunkur and Tarnee Sunkur Mujmoodars had monetary transactions at Rampore Bauleah, with her late husband, Bishennath Shah, from whose house they drew sums to pay their revenue to the collector: these transactions were duly entered in the account books of the house. That on the 19th *Chyte* of the *Muhajunee* year 1238, corresponding with 31st March 1831, Tarnee Sunkur took the sum of 900 rupees; and, for himself and Jyesunkur Mujmoodar, signed the account

books acknowledging (after payment of 2 rupees on the 10th of that month, which was the *Ram Nobomee* festival) that the sum of 2,374 Sicca rupees, including the balance of the year 1237, were due by him: that this account was duly attested by witnesses. That Tarnee has died without paying the same; and that Hursunkur and Parbuttee Sunkur are executors of Tarnee Sunkur, and guardians of the latter's minor sons, and in possession of the estate. As the interest on the principal, claimed at the rate of 12 per cent. per annum, exceeds the principal, plaintiff sues for the principal and interest to the same amount; making a total of 4,748 Sicca rupees, or 5,064 Company's rupees, 8 annas, 6 pie, with interest to date of realization. She alludes to other claims to be preferred hereafter.

Answer of Parbuttee and Hursunkur Mujmoodars, filed 22d August 1843. The plaintiff does not specify when and by whom the account was opened with the plaintiff's house; nor does she say whether the sums were paid to us, or to *mookhtars*. It is not customary among *muhajuns* to pay money on the day of the *Ram Nobomee* festival: the statement that 900 rupees were paid on that day is false. Under Regulation 10 of 1829, put in force in 1235 B. S., all transactions of the nature set forth in this case must be carried on stamp paper, not on plain. Tarnee never in fact had any dealings with plaintiff's husband: the truth is, that Jyesunkur, a co-sharer, has colluded with plaintiff. We are about to sue him, hence this action. The account is said to have been signed by Tarnee, who is dead. If he signed the account, why was not the action brought in his life-time. A period of almost 12 years has elapsed, during which neither the plaintiff, nor her husband, up to the date of his death, ever came forward with this demand. Moreover, Tarnee's name is not to be found in any of plaintiff's books before the year 1237, or subsequent to the year 1238. Plaintiff should have sued for all that was due to her, not for a portion. The claim is supported by witnesses attached to Jyesunkur Mujmoodar's interests.

Answer of Jyesunkur Mujmoodar, dated the 12th September 1843. Denies that he signed the books; denies all interest in the plaintiff's suit; states Tarnee had no authority to sign for him; that no revenue of his estate was paid through plaintiff's house up to 1238 B. S.; and that he paid regularly to the collector as shown by receipts.

The principal sudder ameen, on the date already mentioned, recorded his opinion as follows. The two account books of 1237 and 1238, and the evidence of three witnesses (named) whose names are subscribed to the *Matta* (account book) of 1238, prove monetary transactions between the plaintiff's husband and Tarnee Sunkur Mujmoodar, as also his signature to the balance of 2,374 Sicca rupees for himself and Jyesunkur. The

account books as they are, are unobjectionable under the provisions of Circular Order Sudder Dewanny Adawlut of the 31st August 1838. On comparison of the signature of Tarnee subscribed to the adjusted account, with his signatures to applications for leave of absence, dated 31st January and 19th February 1834, and the 21st February 1832, they appear to correspond.

The plea urged, in a supplementary answer put in, that Tarnee was on leave and absent on the day that the account book was signed is not proved,—the copies of the documents to establish that fact not having been put in. I therefore decree in favor of the plaintiff, and award payment of *Sicca* rupees 2,304, or Company's rupees 2,532, to her by the heirs of Tarnee Sunkur Mujmoodar. No mention of interest being made in the *khatta*, none can be given antecedent to the date of plaint under Act 32 of 1839. As Jyesunkur was not present at the signature, he is released from all demand. Interest to be given from date of plaint.

The principal sudder ameen's decision is founded upon a comparison of the deceased Tarnee's signatures, on the evidence of three witnesses, and on the admissibility of the account books put in by the plaintiff.

It is remarkable, that this action was not brought in the life time of the lender, or of the alleged borrower of the money, but by the widow of the former, against the heirs of the latter, after the lapse of nearly 12 years. The evidence of the three witnesses, (Bowul Mallee, Sheikh Buktear, and Sheikh Panjoo) all illiterate poor men, of whom the two latter chanced to be on the spot, is quite unworthy of credit. The details of the transaction are too minutely set forth in their depositions to be believed, seeing that more than 12 years had gone by at the time they were examined. Setting aside the question of evidence, however, the Court observe, as to Circular Order No. 17 of the 31st August 1838, on the strength of which the principal sudder ameen has admitted the account books, that that officer has misunderstood and misapplied its provisions. It is explanatory of a Circular No. 7, dated 7th May previous, and of the Construction laid down by the Court on the 18th August 1820 (No. 325), both of which require, that when obligations for money debts are formally entered in merchant's and banker's books, and are regularly signed and attested, and the books are filed on the record as proof of claims, such books cannot be received as evidence in the absence of a proper stamp, as prescribed in schedule A, Regulation 10 of 1829. In this suit, the *khatta* books are duly signed at the foot of the account, the total of which is summed up and attested by the witnesses already referred to: the books are not therefore admissible, and must be rejected *in toto* as regards this action. Under the above circumstances, the Court need not enter upon a comparison of signatures, at best, unsupported by evidence, a doubtful test of the integrity of a document. They therefore

decree in favor of the appellant, and reverse the judgment of the principal sudder ameen, with costs of both courts chargeable to the plaintiff, the respondent.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 303 OF 1847.

Special Appeal from a decision passed by G. C. Cheap, Esq., Judge of Rajshahye, April 26th, 1845; reversing a decree passed by the Sudder Ameen of that District, August 29th, 1843.

RAO RAM SHUNKER RAE, APPELLANT, (PLAINTIFF,)

versus

MOULVEE SYUD AHMED AND OTHERS, (RESPONDENTS,
DEFENDANTS.

Wukeel of Appellant—Kishen Kishore Ghose.

Wukeels of Respondents—Lootf-ur Ruhman and Gopal Kishen Rae.

THE following is the decision of the zillah judge in this case.

‘ This is a suit brought by a *putneedar* to assess certain lands in the possession of the appellant, and which the latter claims as his *lakhiraj*, and not liable to assessment. The sudder ameen gave the respondent a decree; but this I think must be reversed. *First*, the principal sudder ameen dismissed the respondent’s claim for possession for the land, and it is clear from Mr. Douglas’ (judge) decision of the 14th March 1796, that the land had been ruled to be *lakhiraj*; *second*, I think the claim barred on the ground of lapse of time, since Sujnarain never sued to try the question of the land being *khiraj* or *lakhiraj*; and, *third*, I do not hold the right to sue to resume lands, or assess what have been held as *lakhiraj* to be vested in a *shikamee*, or dependant *putneedar*. On these grounds, I reverse the decision; and do not think it necessary to enter upon the pleas that the suit was wrong

laid with reference to Construction No. 576, or that the assessment was opposed to that made by Mr. Halliday, when acting collector of the lands adjoining. Appeal therefore decreed, and the sudder ameen's decision reversed. Costs of appeal to be paid by the respondent ; and of the sudder ameen's court by the parties respectively.'

The special appeal was admitted, on the 16th January 1847, under the following certificate recorded by Mr. J. F. M. Reid :—

'The petitioner (appellant) sued to assess 19 *biggahs* of land in Govind Chuck, *turuf* Gorapakha, with the annual sum of 84 rupees 14 *annas*, and to recover rents for the years 1244 to 1247 inclusive. The sudder ameen passed a decree in his favor assessing the land, and awarding the rents at that rate for past years. The judge reversed the decision :—*first*, because the principal sudder ameen, on 28th December 1840, dismissed the plaintiff's claim to possession of the land, and because a former judge, Mr. Douglas, ruled the land to be *lakhiraj*; *second*, because Sujnurain, the zemindar, (a party in the case before Mr. Douglas) did not sue to resume within the period prescribed for limitation; and, *third*, because he does not consider it competent to a *shikamee*, or dependant *talookdar*, to resume or assess land held under rent-free tenures.

'I am by no means satisfied that the land contended for in the two suits are identical; and observe, that while the principal sudder ameen rejects the claim of petitioner to be put in possession, he rejects the defendant's claim to hold as *lakhiraj*, and tells petitioner to sue to assess. Independant of the doubt above expressed,—whether the lands are identical,—it has been ruled, that a claim to assess is not affected by the rule of limitations.

'The *third* point I consider to be untenable, and contrary to the practice of the courts. The judge reserves certain other points, deeming it needless to go into them. I think that a special appeal should be admitted to try the three points above indicated, and admit it accordingly.'

We are not satisfied that the lands alluded to in Mr. Douglas's decree of 14th March 1796, are the same as those which formed the subject of dispute in the case decided by the principal sudder ameen on the 28th December 1840; but even if they are, the decree of Mr. Douglas merely settles the question of possession, and does not rule that the lands are *lakhiraj*; whereas the decree of the 28th December 1840, which was passed after enquiry under the provisions of Section 30, Regulation 2, 1819, declares that they are not, and leaves the plaintiff to his action for assessment of rents.

On the *second* point, we can see nothing in the case to shew that the action is barred by the rule of limitation.

On the *third* point, we are of opinion, that the *putneedar* is competent to sue for the resumption and assessment of lands, held as *lakhiraj* within his *putnee*.

The judge alludes in his decree to Construction 576. We advert to this merely to point out to him, that the exigency of that Construction was complied with in the previous suit, decided on the 28th December 1840, which has become final, no appeal from it having been preferred.

We are accordingly of opinion, that the plaintiff is entitled to a decree in this case, and to recover arrears of rent at the rate at which the lands are assessed, from the date of the decree of the 28th December 1840. The judge has passed no judgment in regard to the rate fixed by the *sudder ameen*.

We accordingly remand it to the judge, in order, that he may dispose of this point, and decide the case upon its merits, independently of the points of law now settled by this Court.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 359 OF 1847.

Special Appeal from a decision passed by the 2d Principal Sudder Ameen of Patna, November 16th, 1846; reversing a decree passed by the Moonsiff of Patna, June 27th, 1846.

SOPHUL MEHTOO, APPELLANT, (PLAINTIFF,)

versus

SEETARAM, RESPONDENT, (DEFENDANT.)

Wukeels of Appellant—Hamid Russool and E. Colebrooke.

Wukeel of Respondent—Ameer Ali.

THIS case was admitted to special appeal, on the 16th June 1847, under the following certificate recorded by Sir R. Barlow :—

‘The petitioner (appellant) sues to reverse a summary decision of the collector of Patna, dated 26th February 1846, in favor of the defendant Seetaram, who sued for rents from the commencement of the *Fuslee* year 1253, i. e. from *Assin* to *Poose*, to the amount of Company’s rupees 75, 5 *annas*. The moonsiff was of opinion, that as defendant (the plaintiff in the summary suit) claimed the entire rents, and it was clear that Guneish Lal and others, a third party before him, were the proprietors of one-half, the defendant was not entitled to a decision in his favor by the collector, and therefore decreed in favor of the plaintiff: he considered him a *ryut* of the third party Guneish Lal, and others, who were in advance to the *maliks*. The principal sudder ameen reversed his decision, for the reasons recorded in his proceedings of the 16th November 1846.

‘The object of this action is to reverse a summary decision of the collector; and the question to be decided is, did the suit for rents, disposed of by that officer, come within his competence.

‘The balance claimed is for the four first months of 1253. No *kubooleut* was filed by Seetaram showing that the plaintiff was his *ryut*; nor were any *jumma wasil bakee* accounts of *previous* years filed in the collector’s office. Under Section 10, Regulation 8 of 1831, the summary jurisdiction of collectors is restricted to the enforcing payment of rents paid in past years. As none such were paid by the plaintiff to the defendant, and no engagements were entered into between the parties, the collector had no jurisdiction in the case. A special appeal is admitted to set aside the principal sudder ameen’s decision.

‘Cases Nos. 360 and 363, which follow, were disposed of by the lower courts on the same day, and on the same principles. The plaintiffs in both are *ryuts*, seeking to reverse the summary decisions of the collector in favor of Seetaram. The Court’s decision in this case is applicable to the suits Nos. 360 and 363.’

Under the provisions of Section 10, Regulation 8 of 1831, the summary jurisdiction of the collector is restricted to the enforcement of payment of the rents paid in past years. In the cases now before the Court, the defendant (the plaintiff before the collector) produced no accounts of former years, neither did he offer any *bond fide* written engagement, *kubooleut* or such like, signed by the *ryut*. The summary decision therefore is invalid. We reverse the decree of the principal sudder ameen and also that of the collector; decreeing for the special appellant, without recording any opinion (as the moonsiff has done) as to the rights of any parties claiming to collect rents from the tenants. Costs chargeable to the respondent.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,
JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 360 OF 1847.

Special Appeal from a decision passed by the 2nd Principal Sudder Ameen of Patna, November 16th, 1846; reversing a decree passed by the Moonsiff of Patna, June 27th, 1846.

DHOWTAL MEHTOO, APPELLANT, (PLAINTIFF,)
versus

SEETARAM, RESPONDENT, (DEFENDANT.)

Wukeels of Appellant—Hamid Russool and E. Colebrooke.

Wukeel of Respondent—Ameer Ali.

THIS case was admitted to special appeal, on the 16th June 1847, by Sir R. Barlow, on the same grounds as those set forth in the preceding case No. 359; and the order passed is consequently the same.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq., and
SIR R. BARLOW, BART.,
JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 363 OF 1847.

Special Appeal from a decision passed by the 2nd Principal Sudder Ameen of Patna, November 16th, 1846; reversing a decree passed by the Moonsiff of Patna, June 27th, 1846.

SHEO CHURN MEHTOO AND OTHERS, APPELLANTS,
(PLAINTIFFS,)

versus

SEETARAM, RESPONDENT, (DEFENDANT.)

Wukeels of Appellants—Hamid Russool and E. Colebrooke.

Wukeel of Respondent—Ameer Ali.

THIS case was admitted to special appeal, on the 16th June 1847, by Sir R. Barlow, on the same grounds as those set forth in the preceding case No. 359; and the order passed is consequently the same.

THE 25TH MARCH 1848.

PRESENT:

C. TUCKER, Esq. and
SIR R. BARLOW, BART.,
JUDGES.

J. A. F. HAWKINS, Esq.,
TEMPORARY JUDGE.

CASE No. 192 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Zillah Backergunge, August 28th, 1845 ; amending a decree passed by the Moonsiff of Burisal, December 24th, 1844.

MUSST. UNOPOORNA, APPELLANT, (PLAINTIFF,)

versus

DEONATH DAS FOR HIMSELF, AND AS GUARDIAN OF MOHUN CHUND DAS, RESPONDENT, (DEFENDANT.)

Wukeel of Appellant—Kishen Kishore Ghose.

Respondent—Defaulting.

THIS case was admitted to special appeal, on the 27th April 1847, under the following certificate recorded by Mr. C. Tucker :—

‘In this case the petitioner, plaintiff, sued for possession, with *vasilat*, of the separated *talook* called Ram Kunt Dut, of which she alleged she had been dispossessed by the defendant’s father. Defendant pleaded that one moiety of the said *talook* formed the *huwaleh* of Sheikh Morad, paying an annual *jumma* of 4 rupees ; the other moiety formed the *huwaleh* of Mohummud Kulleem, paying the same amount of *jumma* ; both which *huwalehs* had been purchased by his father, under a confirmatory grant by the plaintiff herself.

‘The moonsiff decreed in full for the plaintiff, declaring the alleged purchases to be not proved. The principal sudder ameen affirmed all the moonsiff had stated ; but amended his order by declaring the defendant entitled to possession as a *kursa ryut* on paying the rent (8 rupees per annum) to the plaintiff.

‘This is gross inconsistency, and amounts in fact to a decree in favor of the defendant, whilst ostensibly the decision of the lower court is affirmed. The defendant pleaded the rights of an *huwalehdar*, under purchase from previous *huwalehdars* ; and, failing to establish his plea, is not entitled to retain any possession ; and even if he were, it is not competent for the principal sudder ameen to fix in this case the amount rent he should pay to the plaintiff. For these reasons I admit the special appeal.’

The respondent did not appear. For the reasons stated in the above certificate, we amend the decision of the principal sudder ameen ; and affirm that of the moonsiff : all costs being chargeable to the respondent.

THE 25TH MARCH 1848.

PRESENT :

C. TUCKER, Esq. and

SIR R. BARLOW, BART.,

JUDGES.

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

CASE No. 166 OF 1847.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, July 16th, 1845 ; reversing a decree passed by the Moonsiff of Pullasee, February 25th, 1843.

HURNATH GOPT AND SHEIKH MUNGUL, APPELLANTS,
(DEFENDANTS,)

versus

MIRTUNJOY DAS, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellants—Abas Ali and G. S. Judge.

Wukeel of Respondent—Uzmut Oollah.

THIS case was admitted to special appeal, on the 6th March 1847, under the following certificate recorded by Mr. C. Tucker :—

‘The plaintiff in this case, stated that his father, deceased, had purchased at public sale, in execution of a decree, the rights and interests of Ruheemoolah, Niamutoollah, and Sonaoollah, in *kismut* Balooshye, *talook* Madaree, which he alleged consisted of 5-16ths of the whole, viz. 4-16th *mowroosee*, and 1-16th purchased from Zukee Booea, another sharer in the *talook* at large.

‘That, on his father’s death, he took a *kubooleut* from the defendant Sheikh Mungul for 5-16th of his *jumma*: that he paid 4-16th; but, in collusion with the other defendant, Hurnath Gopt, refused to pay the 1-16th, for which balance he brought the present action for three years, viz. 1246-47-48.

‘Sheikh Mungul denied the *kubooleut*; and Hurnath Gopt pleaded that he had purchased from Ruheemollah, Niamutoollah, and Sonaoollah, the 1-16th share purchased by them from Zukee Booea, some time before the sale of those persons’ rights and interests to the plaintiff. The moonsiff of Pullasee dismissed the case; but, on appeal, the principal sudder ameen, Mr. Riley, decreed for plaintiff, stating that he considered the *kubooleut* to be established, and that he did not believe the alleged sale to Hurnath Gopt.

‘I admit a special appeal as far as concerns the petitioner, Hurnath Gopt. In this case,—a suit for balance of rent,—the principal sudder ameen had no right to entertain the question of the validity of Hurnath Gopt’s alleged purchase. He should have confined

himself to the claim against the defendant, for balance of rent on the *kuboolecut*?

It is clear that the principal sudder ameen has gone beyond the point at issue, in expressing any opinion regarding the alleged purchase by Hurnath Gopt in this case. We accordingly amend his decision, and confine it to the point at issue between the plaintiff and the defendant, Sheikh Mungul; affirming his decree in that respect, without giving any opinion on the claim set up by Hurnath Gopt, who will pay the expenses of this appeal.

THE 27TH MARCH 1848.

PRESENT:

R. H. RATTRAY and

A. DICK, ESQs.,

JUDGES.

W. B. JACKSON, ESQ.,

TEMPORARY JUDGE.

CASE No. 504 OF 1847.

*Regular Appeal from a decision passed by the Acting Principal Sud-
der Ameen of Behar, Mohummud Ibrahim Khan, July 17th, 1847.*

BIRJ LAL OPADIAH AND BECHUN OPADIAH, APPEL-
LANTS, (PLAINTIFFS,)

versus

MUSST. MOTEE SOONDREE DASEE, WIDOW OF RAE
RUSSIK LAL MITR, DECEASED, RESPONDENT, (DEFEN-
DANT.)

*Wukeels of Appellants—J. G. Waller, Aftabodeen and Ameer Ali.
Wukeels of Respondent—Pursun Kōmar Thakur, Govind Chundur
Mokerjee and Kishen Kishore Ghose.*

THIS suit was instituted by appellants, on the 12th June 1846, to recover from respondent possession of an 8½ annas' share of certain *talooks*, as set forth, in virtue of a lease. Estimate for stamp (with reference to Construction No. 702) Company's rupees 2,00,000.

The reversal of an order passed by the session judge, on the 27th May 1846, is, further, sought to be obtained.

Under a decree of the Supreme Court, the sum of 1,57,401 rupees was due by respondent to appellants; which decree was pending in that Court under process of execution. A compromise had been agreed to by the parties, the terms of which were reduced to writing in two *ikrarnamehs*: one bearing date the 1st March, the other the 8th May 1844. Of these, the latter only is filed.

The substance of the compromise, was, that appellants should stay all further proceedings in the Supreme Court, and accept payment of the amount due to them by instalments derivable from a lease of respondent's estate, granted on specific conditions ; amongst which was the regular payment of the revenue, of the allowances of certain *mookhtars*, and of a monthly stipend to respondent of 425 rupees.

The lease was to be entered upon, so soon as the stipulated arrangement should be effected in the Supreme Court ; but it appearing that injury would be sustained by this delay, the season of cultivation being at hand, possession of the lands was at once given, and the farmers (appellants) commenced operations as such, and continued to hold without interruption or hindrance for nearly a year.

About this time, disputes, which had arisen between the parties, broke out into open quarrels between them, their adherents, and dependents, and at last came under cognizance of the magistrate. The result of his interference was an order, maintaining appellants in possession (on the score of proved previous occupancy), and referring respondent to the civil court for her remedy.

Against this an appeal was made to the session judge, who, with reference to Construction No. 1333, more particularly, reversed the magistrate's order, ejected appellants, and confirmed respondent as proprietor of the estate, in exclusive possession of it.

The principal sudder ameen has upheld this, in the judgment now appealed against, on the ground of the terms of the agreement between the parties having been violated by appellants, generally as regards the *ikrarnaméh*, and particularly with advertence to the non-payment of respondent's stipend, *mokhtar's* allowances, &c.

The judge before whom the case came in the first instance (Mr. R. H. Rattray,) was of opinion, that the session judge's proceeding was illegal ; that he had no competency to enter upon the question of *right* in connexion with the point to be determined by him, which question was not only not involved, but was altogether a civil matter, foreign to what was before him ; that the Court's letter (to himself) of the 4th August 1847, was opposed to his proceeding ; that the breach of agreement between the parties to the suit was not fairly imputable to appellants, who had been thwarted in their endeavours to abide by their engagement, by the evasion and non-performance of respondent's promises ; that the decision appealed against could not be justly affirmed ; and that the proceedings should be laid before a full Court under Act 2 of 1843.

In conformity with this opinion, the case has this day been revised by us.

MESSRS. RATTRAY AND JACKSON.—It appears to us, that no sufficient proof has been advanced by respondent, of appellants'

having failed in any essential point to perform their part of the contract, under which they held the lease of the lands from respondent, in satisfaction of the decree against respondent in their favor; that respondent therefore had no right to dispossess them from the lands in question; and that the suit which they have brought to regain possession, with mesne proceeds, must be decided in their favor. We therefore order that the decision of the principal sudder ameen be reversed, and possession awarded to appellants, with mesne proceeds, subject to the terms of the agreement; the costs of both courts being chargeable to respondent.

MR. DICK.—The precise object of this action was to regain possession of a leasehold estate, held under certain conditions, and to have reversed a decision of the session judge reversing the decision of the magistrate, and ousting leaseholders, in possession, because they had broken the conditions of their lease, and consequently were liable to be ousted by the lessor.

The action is maintained on the grounds:—*first*, that no breach on the part of lessees occurred; and, *secondly*, that the session judge acted illegally in entering into any inquiry regarding the fulfilment of conditions, in a case under Regulation 4, 1840, which required him to look to possession only.

The defence rested on the fact of the conditions having been broken by the lessees, and, in consequence, of the inherent right of the lessor to resume possession: and that the session judge's decision was correct and sound under Section 10, Regulation 4, 1840.

The principal sudder ameen deeming three of the conditions of the lease to have been violated, upheld the session judge's order, and decided in favor of the lessor, dismissing the claim of the lessees for re-possession.

I find the principal sudder ameen has not, as required by Clause 2, Section 10, Regulation 26, 1814, ascertained the precise object of the suit, and the grounds on which it is maintained, and recorded the result in a separate proceeding, or *roobukaree*; nor, as required by Clause 3 of the above Section, has he recorded the point, or points, to be established respectively by the parties. This is indicative of culpable negligence, or incapacity to ascertain the issues, or inability to explain to the parties the points to be established by them respectively.

Fortunately, in this case, they are readily discoverable: and in appeal, we have only to ascertain whether the three conditions, which the principal sudder ameen has deemed to have been broken by appellants, and on which their claim was rejected, were really violated.

The *first* is, that appellants engaged to stay proceedings in the Supreme Court in execution of their decree. On this point, appellants

have filed a letter from their solicitor, Mr. T. B. Swinhoe, in which it is stated that the requisite deeds were prepared and sent to the solicitor of respondent, Mr. P. Homfray, for approval; who kept them a whole year, and then returned them without approval. Nothing in contradiction was filed by respondent, but merely an official certificate from the Supreme Court, shewing that the case in question was still on the file.

I find, however, on perusal of the deed of engagement, that both parties, through their attorneys, were bound to co-operate to have the case struck off the file; and respondent has not shewn that he, or his attorney, used the least exertion: and on the other hand, it has not been even asserted that appellants took any step to execute the decree. There is, therefore, no proof of the *first* of the three conditions having been violated.

The *second* and *third* conditions alleged to have been broken, are a monthly stipend of 420 rupees to respondent, and an amount of 162 rupees monthly wages of *mookhtars* of respondent. These, it appears, had not been paid in full in 1252 B. E. as agreed. But it appears, that much more than those sums were paid on account of the respondent, in the shape of arrears of revenue, which perilled the right and title to the property itself; and though that was done in virtue of another deed of agreement, that deed was clearly supplementary of the lease. Therefore, there is nothing even to induce a supposition, that the lessees were guilty of a breach of conditions in bad faith. In fact, virtually, there has been no breach, for the lessees actually paid much more than bound by those conditions.

It has been erroneously argued for appellants, that this suit being to reverse the decision of the session judge, if it be shewn that that decision was illegal, and that appellants were in possession, that decision should be reversed, and possession restored without inquiry into right and title, and the other party left to sue. The fact however is, that no suit can be instituted to reverse a decision given under Act 4, 1840. Such decision is final; but it is only temporary, and becomes null and void the moment a claim is decided for right and title, on which alone possession can be given, or the decision under Act 4, 1840, disturbed.

The session judge no doubt acted under Section 10, Act 4, 1840; but in overlooking Construction 113 November 12th, 1812, and Clauses 2 and 4, Section 18, Regulation 8, 1819, misapprehended the powers given to lessors under Clause 7, Section 15, Regulation 7, 1799.

I therefore concur with my colleagues in reversing the decision of the principal sudder ameen, and awarding full costs to appellants; though in consequence of the many important points involved, I have separately recorded my sentiments.

THE 28TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 577 OF 1847.

IN the matter of the petition of Kareemun Jha, filed in this Court on the 8th September 1847, praying for the admission of a special appeal from the decision of Mr. Noney, acting principal sudder ameen of Purneah, under date the 10th June 1847; affirming that of the moonsiff of Urrureeah, under date the 20th June 1846, in the case of Mackintosh, plaintiff, *versus* the petitioner, defendant.

It is hereby certified that the said application is granted on the following grounds:—

The defendant had attached the plaintiff's property for arrears of rent. The plaintiff sued summarily before the collector to set aside the attachment; but his case having been dismissed, he instituted the present action in the moonsiff's court with the same object. The moonsiff and the principal sudder ameen gave judgment in his favor.

The plaintiff admits having been the tenant of the defendant; but states, that the year before that, for the rents of which his property had been attached, he had given in a resignation of the lease of his lands to the village *putwarree* and the collector of the district. The defendant pleads that the tender of resignation should have been made to himself; and not having been so, was altogether insufficient.

The lower courts have held the tender to have been sufficient; but they have taken no evidence as to the practice which exists in the district in regard to such tenders. The *putwarree* should have been examined, and such further enquiry made as was necessary to throw light upon this point; as generally the tenant is bound to tender his resignation to his lessor, and any departure from this rule can be admitted only on special grounds.

I accordingly admit the appeal, and remand the case for re-trial, with reference to the foregoing remarks.

THE 28TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 578 OF 1847.

IN the matter of the petition of Kareemun Jha, filed in this Court on the 8th September 1847, praying for the admission of a special appeal from the decision of Mr. Noney, acting principal sudder ameen of Purneah, under date the 10th June 1847; affirming that of the moonsiff of Urrureeah, under date the 20th June 1846, in the case of Mackintosh, plaintiff, *versus* the petitioner, defendant.

This is a case of precisely the same nature as the preceding one (No. 577,) and the same order is passed.



THE 28TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 665 OF 1847.

IN the matter of the petition of Mussee-o-Ruhman and others, filed in this Court on the 5th October 1847, praying for the admission of a special appeal from the decision of Mr. Reily, principal sudder ameen of Hooghly, under date the 27th July 1847; reversing that of the moonsiff of Dwarhutta, under date the 23d November 1846, in the case of the petitioners, plaintiffs, *versus* Taujooddeen and others, defendants.

The following decree of the principal sudder ameen shews the particulars of this case :—

‘Plaintiffs declare that they had *nuzooraut lakhiraj* land in the village of Suteepore and others; that, of this, the profits of 5 *biggahs* were appropriated by their ancestors to the performance, at the *mohurrum* festival, of the *sirnee* and *shurbut*, and *fateha*, and in giving alms to Hindoos and Mussulmans. That, after their de-

cease, plaintiffs did the same ; that as they were obliged, for the purpose of gaining a livelihood, to reside away from the place, they appointed Kazeer Nujeeboollah their *mookhtar*, to let the lands and collect the rents for them ; that Nujeeboollah let 16 *cottahs* and a *gudira* (pond) to Sheikh Hutoo, the father of Taujooddeen and others, for 2 rupees 8 *annas* annually, which he collected of them and paid to plaintiffs, and that they appropriated the money as formerly. That Nujeeboollah died, and disputes arose between Taujooddeen and others of the village, and plaintiffs, which made them their mortal enemies ; and having conspired with Nujeeboollah's sons, Aleemoollah and Nuwaboodeen, now deceased, Taujooddeen and Zumeerooddeen instituted a suit (No. 1075) against Aleemoollah and Ebadollah and Nuwaboodeen, sons of Nujeeboollah, stating that defendants had dispossessed them of the lands, and the *gudira* in question ; and the case was referred to Mr. Herklots, the sudder ameen. That having learnt of the fraudulent nature of the transaction, plaintiffs appeared and opposed the suit ; but the sudder ameen, on the 23d November 1832, decreed the case, authorizing them to sue the heirs of Nujeeboollah. Taujooddeen and Zumeerooddeen and Ameeroodeen are in possession of the lands and the *gudira* ; that plaintiffs are the *imam-saheb's khadim* ; and, according to the permission given them in the decree, they sue to recover possession.

Defendants reply, that the lands are not *nuzooraut* lands ; that they were Nujeeboollah's *lakhiraj* lands, which defendants' father, in the year 1225, bought of him ; that Nujeeboollah's sons had dispossessed them, and they brought an action and obtained a decree. That were the plea of the lands being endowed property true, plaintiffs would not have, for so long a time, delayed preferring their claim ; that had they appointed Nujeeboollah their *mookhtar*, they would have taken an engagement from him.

POINTS FOR ADJUDICATION.

‘ *First.* Are the lands endowed lands ?

‘ *Second.* Do the rules of limitation bar the claim ?

‘ Plaintiffs declare they did not always reside in the village, and therefore, for the purpose of keeping up the *sirnee* and *fateha*, they had appointed Nujeeboollah their *mookhtar*, and that he had let the lands in dispute to defendants' father, Sheikh Hutoo ; but plaintiffs have adduced no documentary evidence of their having entrusted the lands with Nujeeboollah, or of having appointed him their *mookhtar*. He has examined three witnesses, and they say it is *seven or eight years* since plaintiffs entrusted the lands with Nujeeboollah ; but Nujeeboollah's sons having dispossessed defendants, the latter sued them and obtained a decree of court on the 23d November 1832, more than *fifteen years* since. What reliance may be placed on evidence so palpably disproved ? Moreover, the decree records that ‘ the lands are in Luteepoor, and measure

about 12 *cottahs*, which was defendant's (Aleemoollah's) father's *lakhiraj* lands; that it is 20 or 21 years since Nujeeboollah made a gift of the lands to the people in the name of the *imam*. That it is 14 years since Nujeeboollah took 25 rupees of plaintiffs, and sold it to them, and executed the *kubaleh*, putting them in possession of the lands; that plaintiffs built their dwelling house on it, and have been in undisturbed possession. That it is clearly proved, by the evidence of the witnesses, that defendants sold the lands to plaintiffs for 25 rupees, and that plaintiffs having erected houses are living in them; that defendants pleaded that the lands are endowed, but they have adduced no documentary evidence on the point.'

'Now, the present plaintiff had appeared in that case, and asserted his claims; but though those claims were overruled, he preferred no appeal. Nor will the *taidaud* filed by plaintiffs be of any avail, as it has not been proved that the lands in dispute are identical with those stated in the *taidaud*.

'In regard to the *second* point, the decree above alluded to establishes the fact of defendants having been in possession of the lands; and it is 15 years since the decree was passed. This, together with the period of possession anterior to the date of the decree, proves defendants to have been in undisturbed possession for 29 years.

'The appeal is therefore decreed; and the moonsiff's decree of the 23d November 1846 cancelled. Costs payable by respondents, Mussee-o-Ruhman and Oomed Ali.'

The principal sudder ameen has decided the two points noticed by him entirely upon the former decree, to which the plaintiffs were not parties in the strict sense of that term; and against the order in which they were told to sue if they had any objection to it. The present suit was lodged within 12 years from the date of that order; and the principal sudder ameen should have recorded his opinion whether they were thus in time, especially as the plaintiffs alleged that they had been in the receipt of the rent of the land through their agent, Nujeeboollah; which, if true, constituted a sufficient possession to entitle them to come in upon that ground, supposing of course that they had received the profits within the period allowed by law for the cognizance of civil actions. The plaintiffs, moreover, impugned the facts stated in the decree of the 23d November 1832; and they should have had their proofs to that effect considered by the principal sudder ameen, and his opinion recorded thereon.

With reference to the foregoing remarks, I admit the appeal, considering the case to have been decided without a sufficient investigation of its merits; and remand it for re-trial to the court of the principal sudder ameen.

‘Against this decision an appeal was preferred by the defendant, on the grounds that the *mookhtarnameh*, or power of attorney, furnished the *mookhtar* with no authority to convey an estate; moreover, that the principal sudder ameen had misapplied the decision of the Sudder Court, which was no precedent in the present case.

‘In reply to the above, the respondent insists on the validity of the sale of the one *anna* share, as set forth in the petition of the *mookhtar* to the collector.

‘The sole point for consideration in the present appeal, rests on the construction to be put on the *mookhtarnameh*, which is drawn out in nearly the following terms:—‘We, Debee Purshaud Singh and Thakur Singh, purchasers of the 4 *anna* share of *mouzah* Kutha: whereas an appeal from the order of the deputy collector, relative to the sale of the above property, is now pending before the commissioner of Bhagulpore, we therefore, with our esteem and consent, constitute Amanee Lal, as *mookhtar* in our behalf. We accordingly declare that whatever the said *mookhtar* says, or does, in the above case, to that we consent and agree. We will make neither excuse, nor artifice therein. Given under our hands, &c.’ Now, the above is the customary power which a party delegates to a *mookhtar* in cases before the authorities; and it is written on an 8 *annas*’ stamp paper. Moreover, it is the act not of one individual, but of two. To allow, therefore, the conveyance of the real property of one of the subscribing parties upon such a power, must, in my opinion, be pronounced illegal. The precedent of the Sudder Court, filed by respondent, rules that a client who had bound himself to abide by the acts of his *wukeel* in a particular case, could not be released from his engagement; but in the present instance, the act of the *mookhtar* goes far beyond attending to the interests of his clients in the case before the commissioner. The sale of the property was upheld by that functionary: here then the power granted to Amanee Lal ceased and determined. When the matter again came into the hand of the collector, a special power drawn out by appellant alone, was necessary to render valid such a conveyance. Ordered, that the appeal be decreed, and the decision of the principal sudder ameen be reversed, with all costs chargeable to respondent.’

The judge appears to have mistaken the real point at issue, viz. whether the sale to the plaintiff was effected or not. This did not rest solely upon the authority of the *mookhtar* to give in the petition alluded to; but upon the general evidence to the transaction. The *mookhtarnameh* and petition are part of the evidence, but they are not to be substituted for the deed of sale. Admitting that the *mookhtarnameh* should be rejected altogether, the rest of the plaintiff’s evidence should be considered; and if he can prove the sale, he is entitled to a decree in his favor, independently of the question

of admissibility or otherwise, of the power given to the agent of the defendant.

Under these circumstances, I admit the appeal ; and remand the case for further investigation, with reference to the foregoing observations.

THE 28TH MARCH 1848.

PRESENT :

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 65 OF 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah 24-Pergunnahs, December 26th, 1845.

DOORGAPURSHAD RAE CHOWDHREE, APPELLANT,
(PLAINTIFF,)

versus

TARAPURSHAD RAE CHOWDHREE, RESPONDENT,
(DEFENDANT.)

Wukeels of Appellant—Rampran Rae and Bunsee Buddun Mitr.

Wukeel of Respondent—J. G. Waller.

CLAIM for rupees 27,582, principal and interest, being the share of expenses of certain religious ceremonies appertaining to the six *annas*' share of an estate from 1238 to 1246.

The plaintiff states, that the estate in question was divided between him and his younger brother, the defendant, after their father's death,—the plaintiff getting ten *annas*, and the defendant six *annas*. That, by a will of their father, certain religious ceremonies ought to be kept up, and the expense laid on the estate. That the defendant did not contribute his share to these expenses for the nine years (from 1238 to 1246) ; and the plaintiff, therefore, incurred the whole expense. He now claims reimbursement of the share, which should have been borne by the defendant.

The defendant denies the will produced by the plaintiff ; and further states, that during the period in question he was not in possession of the six *annas*' share of the estate, in consequence of the opposition of this very plaintiff.

On the 26th December 1845, the principal sudder ameen of the 24-Pergunnahs dismissed the claim, rejecting the plaintiff's documents as suspicious ; and considering it evident that the defendant was not in possession.

It seems, that on the death of the father of the parties, disputes took place between the brothers ; and eventually they were adjusted by a *soolehnameh*, or amicable arrangement, in the year 1235,

THE 28TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 812 OF 1847.

IN the matter of the petition of Sishtedhur Chukerbuttee, filed in this Court on the 30th December 1847, praying for the admission of a special appeal from the decision of Mr. Reily, principal sudder ameen of Hooghly, under date the 27th September 1847; reversing that of the moonsiff of Dwarhutta, under date the 4th November 1846, in the case of the petitioner, plaintiff, *versus* Bippur Das and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

This was a suit for arrears of rent founded on a *kuboolleut*, said to have been executed by the defendants; and decided by the moonsiff in plaintiff's favor.

The principal sudder ameen in dismissing the plaint, and reversing the moonsiff's decree, adverts to the evidence of proprietary right pleaded by the defendants, but takes no notice of the *kuboolleut* on which the claim is founded. He should have recorded some opinion on this point; and as he has not done so, I admit the appeal, and remand the case, in order, that he may decide it *de novo*, with reference to the foregoing remarks.

THE 28TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 647 OF 1847.

IN the matter of the petition of Hurdial Singh, filed in this Court on the 4th October 1847, praying for the admission of a special appeal from the decision of Mr. W. S. Alexander, judge of Bhagulpore, under date the 21st August 1847; reversing that of the principal sudder ameen of that district, under date 21st July 1846, in the case of the petitioner, plaintiff, *versus* Thakur Singh, defendant.

It is hereby certified that the said application is granted on the following grounds.

The particulars of this case are given at page 55 of the decisions of the judge of Bhagulpore for 1847, as follows:—

‘Plaintiff brought this suit against defendant, to obtain possession of one *anna* share of *mouzah* Kutha, *pergunnah* Moolkee, with its original villages and dependencies, together with mesne profits from the *Fuslee* year 1246 to 1252. Suit laid at Company’s rupees 2,822-2-9.

‘The plaint sets forth, that on the 21st July 1838, a sale of the 4 *annu* share of the aforementioned estate, for arrears of public revenue, was effected by the collector of Monghyr; that one Debee Purshaud and the defendant, Thakur Singh, became the joint purchasers. That, on the same day, the said defendant transferred to plaintiff a one *anna* share out of the two *annas*, the moiety acquired by defendant, on the aforementioned purchase. That defendant received from plaintiff Company’s rupees 162 in the shape of earnest money; that on the 15th November 1838, a petition was presented to the collector by Amanee Lal, the *mookhtar* of defendant, setting forth the above particulars; that the remainder of the purchase money was made good on the 23rd September 1839, notwithstanding the said defendant refused to put plaintiff in possession.

‘The defendant, in his answer, pleads the general issue; and specially that no written authority was granted by him to his *mookhtar* to present a petition to the collector, stating that he (defendant) had admitted plaintiff as a one *anna* share-holder in the property purchased at the sale.

‘The principal sudder ameen, on the 6th March 1846, proceeded to dismiss the suit, in consequence of the failure of the plaintiff to adduce proof of the claim brought forward in his plaint.

‘Plaintiff, on the 30th March ensuing, submitted an application to the principal sudder ameen for review of judgment passed, filing a summary decision of the Court of Sudder Dewanny, under date 22d March 1842, in which it was ruled that a decree-holder having bound himself in his *wukaluthameh*, to abide by the acts of his *wukeel*, must be held to that engagement. By this *dictum*, therefore, of the Superior Court, the defendant in the present suit was bound by the act of his *mookhtar*,—he having bound himself in his *mookhtarnameh* to abide by the acts of his *mookhtar*. Under Clause 1, Section 19, Regulation 5 of 1831, the papers of the case having been forwarded to the then judge with an opinion that the review prayed for should be granted, the principal sudder ameen, on the 13th April 1846, was authorized to review his judgment passed.

‘The case again came before the principal sudder ameen, when he set aside his former judgment; being now of opinion, from the summary decision of the Sudder Court, that defendant was bound by the act of his *mookhtar*, accordingly he pronounced the sale a valid one; and directed possession to be given to plaintiff, leaving the question of mesne profits to be hereafter adjusted.

him with the office of *dundee*, and with the care of the property and temple. The plaintiff's right to succeed was acknowledged by the local agents, who themselves appointed him with reference to his right as chief disciple, and under the abovementioned deed. Afterwards, the plaintiff was accused before the magistrate, and convicted of entering a house at night in a turbulent manner, and was fined 32 rupees. It was also stated, in the course of the enquiry, that he cohabited with the daughter of his *gooroo*, (spiritual preceptor,) and that he was in the habit of harbouring dacoits: on this ground, it would seem, he was thought unfit to hold the office, and was deprived of it by the local agents. The local agents have omitted to file any record of their proceedings removing him; but I gather the above information from the admissions of the parties, and the papers put in, in support of them.

Now, the property is evidently of the nature of an endowment, and descends by the established rule of succession from the *gooroo* (master) to the *chela* (disciple),—the master nominating the disciple previous to his death. This is done to prevent disputes among the disciples: the lands are therefore of the nature of a hereditary endowment; and would appear to be included in the terms, used in the preamble of Regulation 19, 1810, viz. 'endowments by individuals for the support of Hindu temples.' They are thus so far under the care of the local agents, that they are bound to see to the proper application of the funds according to the intent of the grantor. They are vested by that regulation with authority to enquire into, and report on misappropriation of the funds, and to prevent misappropriation; but I find no where in the regulations that they have power to remove an incumbent. If they could establish disqualification, or misappropriation against him to the satisfaction of a court of justice, they might no doubt obtain an injunction for his removal; but, in this instance, they have of their own authority removed him.

With reference to the plea, that as the local agent appointed they were also competent to remove, I remark that this is not a necessary inference; but, in this case, the local agent did not so much appoint as confirm the succession. Section 13, Regulation 19, 1810, vests them, in certain cases, with power to appoint; but this property is not of the nature described in that section, where 'from past practice or of right, or from defect of other competent persons, the nomination vests in the Government.' On the contrary, the established practice as regards this tenure, is, that the disciple succeeds generally in virtue of inheritance by the previous incumbent. This plea, therefore, will not hold; it is not established that the local agent had the right to appoint; consequently their right to remove is not established on their own reasoning.

If, however, it were duly established that the plaintiff was, under the Hindu law, incapable of properly performing the religious duties attached to this tenure, I should hesitate to restore him to the office of *dundee*, notwithstanding the illegality of his removal. It is therefore to be considered, whether the criminal acts, established against the plaintiff, are such as to disqualify him. On this point of disqualification a precedent is cited, viz. Mohunt Rama Nooj Das *versus* Mohunt Debraj Das, (page 262 Sudder Dewanny Adawlut Reports) decided on the 17th June 1839 by two judges of this Court. After fully consulting the pundit of the Court, as to the nature of the circumstances which disqualify the Court decided that the plaintiff in that case was not disqualified, by a criminal conviction of theft and sentence of three years imprisonment: the conviction of the present plaintiff was of an act far less criminal, and his sentence was comparatively trifling. As to the facts of cohabiting with the daughter of his preceptor and harbouring dacoits, the plaintiff has not been convicted of them; nor is evidence now offered to establish them. They are mentioned incidentally in the proceedings of the authorities, but there is no trial of these facts, nor did they even form part of the charge. Moreover, in the precedent above cited, the pundit, on the Court's requisition, gave a detailed list of the causes of disqualification, among which the acts now charged against plaintiff are not to be found. The precedent appears to me correct, and the subject is there discussed very fully: it is, in my opinion, conclusive as to the fact that the present plaintiff is not disqualified under the Hindu law. I find also, that the pundit, on the reference of the principal sudder ameen in this case, declared there was no ground of disqualification.

The plaintiff's right by succession is proved, and he is not disqualified to succeed by reason of any physical or moral defect. The local agents had no authority to remove him. The decree of the principal sudder ameen, therefore, awarding him possession, as claimed, is correct: it is hereby affirmed. Costs of plaintiff and their own costs, against the local agents. The other appellant in this case claimed a right to the property, consequent on the removal of the plaintiff; as the plaintiff is now re-instated, his claim falls to the ground. He will, however, pay his own costs.

under which the plaintiff was to have ten *annas*, and defendant six *annas* of the estate. Continual disputes however, notwithstanding this arrangement, prevented the defendant from obtaining full possession of his share till 1845: this is plainly established by the proceeding of the judge of the 24-Pergunnahs, dated 9th July 1845. The claim of the plaintiff could, therefore, by no means be made good for the period mentioned in the plaint, which was anterior to his obtaining possession of the share. It is further to be observed, that the plaintiff cannot claim under the will, for that document has been set aside by the arrangement between the brothers; and there is nothing binding on them but that arrangement (*soolehnameh*) in which the two brothers state that they will keep up the *thakoor shewa* (religious rites) each in proportion to his share; but it is no where stated, that, if one brother shall omit to perform his part in these rites, the other shall be at liberty to perform them for him, and to claim reimbursement.

But I am by no means satisfied that the money was expended as stated by the plaintiff; and, even if it had been, he appears to me to have no claim to recover from the defendant. The decision of the principal sudder ameen is therefore correct: it is hereby affirmed. Costs against the appellant.

THE 28TH MARCH 1848.

PRESENT:

W. B. JACKSON, Esq.,

TEMPORARY JUDGE.

CASE No. 12 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, September 28th, 1844.

LOCAL AGENTS OF ZILLAH HOOGLY, APPELLANTS,
(DEFENDANTS,)

versus

KISHNANUND DUNDEE, RESPONDENT, (PLAINTIFF.)

MUKOONDANUND DUNDEE, THIRD PARTY.

Wukeel of Appellants—Pursun Komar Thakur.

Wukeels of Respondent—Gholam Sufdur, Ramapurshad Raee and Nilmonee Banerjee.

CLAIM for possession of *talooka* Kishenbarree, &c. &c., and *aymah* land in Bindrabunpore, &c., and a house and idol, &c. Suit laid at Rs. 8,270.

In case No. 25 of 1845 an appeal was laid against the same decision by Mukoondanund Dundee. Both appeals were taken up at the same time.

The property under litigation consists of certain lands, &c., as above, held heretofore by Sudanund Dundee, to which the performance of certain religious ceremonies is attached. The plaintiff claims a right to succeed to Sudanund Dundee as his principal *chelu* (disciple), and in virtue of a document (*jainusheen-nameh*) executed by the late incumbent, Sudanund Dundee, investing him with the office of *dundee* in succession to himself. He states that his right to succeed has been admitted by the local agents, who confirmed him in the office; but subsequently, without any sufficient reason, removed him from it. He therefore claims to be re-instated in his rights.

The local agents, in answer, admit that the plaintiff was appointed by themselves, under the powers vested in them by Regulation 19, 1810; but state that they afterwards removed him from the office, on the ground of his bad moral character and conviction before the magistrate. They add, that they are bound to see to the proper appropriation of funds of this description; and, finding the plaintiff disqualified from holding the office of *dundee*, dismissed him from it. They state, that this power was exercised under Regulation 19, 1810; and urge, that having appointed him, there can be no doubt of their authority to remove him.

On the 28th September 1844 the principal sudder ameen gave an award in favor of plaintiff, on the ground that the crime established against him before the magistrate was not such as to disqualify him for the office, and to authorise the local agents in turning him out.

The local agents now appeal from this award, insisting on their authority to remove the plaintiff under Regulation 19, 1810, on the score of his moral character. The plaintiff, in appeal, besides his former pleas, urges that the property is not of the description which comes under Regulation 19, 1810.

In the first place, the nature of the tenure is to be considered. It is said to have been acquired by Satdeo Surusuttee by *hibbah*, or gift, from the Rajah of Burdwan; that Satdeo set up an idol and temple, and endowed them with these lands for the expenses of worship; that, on his death, he was succeeded by his *chela* (disciple) agreeably to the established rule of Hindu law as regards the property of a religious ascetic. In this manner the property has several times passed from the incumbent to his disciple, till it came into the hands of Sudanund Dundee. On his death, the present plaintiff succeeded as his discip^{le}, under a deed executed by Sudanund, a short time before death, investing

THE 28TH MARCH 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

CASE No. 2 OF 1845.

*Regular Appeal from a decision passed by Mohummud Kuleem Khan,
Principal Sudder Ameen of Zillah Jessore.*

RANEE INDUR MUNNEE, MOTHER OF MUHINDUR NURAIN RAE, MINOR, THEN KALEE KOMAR GHOSE, GUARDIAN IN LIEU OF THE RANEE, APPELLANT, (DEFENDANT,)

versus

BIDHADHUR RAE, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellant—J. G. Waller and Kishen Kishore Ghose.

Wukeels of Respondents—Pursun Komar Thakur, Ram Pran Raa, and Bunsee Budun Mitr.

SUIT laid at 15,000 Company's rupees, for possession on a *putnee talook*, named *turf Akhoo Janee* and *Binnodepore*, eight *mouzuhs*, or villages.

The claim of plaintiff was founded on inheritance as heir of his mother, to whom the property belonged by gift from her husband, Gunga Dhur. It rested on two grounds:—*first*, the adoption of plaintiff by Gunga Dhur, and his wife, Musst. Shunkuree; *second*, the gift of the *talook* in question to Shunkuree by Gunga Dhur.

The defence denied both allegations, the adoption and the gift.

In the first instance, plaintiff sued Gunga Dhur for five of the villages, and obtained a decree *ex parte*; but was eventually nonsuited in appeal, because he had not sued for the whole property. He then instituted this suit, and having failed to prove the possession of his mother of the property, the gift was deemed nominal, and his claim dismissed. After which he applied for a review of judgment, filing a mass of documentary evidence of his mother's possession. A review was granted, and a decision given in his favor, from which the present appeal was preferred.

The main grounds of appeal are:—*first*, the review was improperly granted, because the respondent had been expressly desired to file proofs of his mother's possession, before the first decision, and had failed to do so; and the proofs he has now filed, he could have filed then had they been in existence, hence they should be deemed fabricated. *Second*, that the suit is barred by lapse of time, the plea of minority being false, which too the principal sudder ameen neglected to investigate. *Third*, that the deed was a *hibbeh-bil-ewuz*, really a sale, and not a gift; and therefore

invalid under the *dhurm shaster*. The respondent denied the validity of any of the pleas of appellant.

The review was granted by the *Sudder Dewanny* under the law, and therefore cannot now be questioned. The non-production however of the evidence, when expressly called for, before the first decision, would have been strongly presumptive against its genuineness, had appellant produced any proof in refutation of it, which she has not. The *second* plea cannot be admitted; because when the mother died in 1230 B. Æ., respondent was a child; and Gunga Dhur, his father and natural guardian, himself took possession of the property, as heir of his wife, and kept appellant from his right. His minority must therefore be counted in his favor. There is proof on record, that the mother died in 1230 B. Æ. Respondent was adopted in 1223 B. Æ., and was then one or two years old. His father, Gunga Dhur, died in 1249 B. Æ., and this suit was instituted in 1249 B. Æ.; respondent was therefore about twenty-eight years old when he instituted the suit, which brings it within twelve years,—his minority being deducted for the above reason.

To establish the *third* plea, appellant has adduced nothing. Appeal dismissed with full costs.

THE 29TH MARCH 1848.

PRESENT :

A. DICK, Esq.

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.

TEMPORARY JUDGES.

CASE No. 190 OF 1846.

Regular Appeal from a decision of Raee Chundur Seekur Chowdhree, Principal Sudder Ameen of West Burdwan.

MAHA RAJAH MUHTAB CHUNDUR, APPELLANT,
(DEFENDANT,)

versus

HUREE KISHOON MUNDUL, RESPONDENT, (PLAINTIFF.)

Wuheels of Appellant—Pursun Komar Thakur, J. G. Waller, and Ameer Ali.

Wuheels of Respondent—Raj Nurain and Kishen Kishore Ghose.

SUIT laid at Company's rupees 6,693, 11 annas, 3 pie, amount, principal and interest, of rents paid from 1225 to 1242 B. Æ. for *Neem mehal*, portion of a *putnee* not delivered according to *pottah*, or agreement. Suit instituted 25th September 1845.

The *mehal* in question formed part of a *putnee* tenure given by appellant to one Beycha Ram, the father of respondent, but of which respondent's father never obtained possession. He, Beycha Ram, notwithstanding, under-let the *mehal* to one Cheedam Manjee. Cheedam Manjee sued the person in possession (a *talookdar* of Nashootee), but his claim was eventually thrown out in 1833. In 1836, plaintiff (respondent) sued appellant to have the amount of *jumma* for the *mehal* erased from the sum total of the rental of his *putnee*, and obtained a decree in 1841, confirmed in 1842. He then instituted this suit for the sums paid with interest.

Case referred to a full bench to decide:—*first*, whether the respondent has any right to claim re-payment of rents voluntarily paid by his father, with the knowledge of the *mehal* being in another's possession, as is evident from the fact of his having under-let it to Cheedam, without giving possession; *second*, whether he was bound to sue for the arrears due, when he sued to expunge the rent of the *mehal* from his *putnee* rental; and, *third*, whether interest on such payments of rent, during so long a period, should be awarded, if even the principal be.

MESSRS. DICK & JACKSON.—On the *first* point, we are of opinion that the respondent has a right to claim repayment; because there is sufficient on record to show, that the zemindar had made a settlement of the *mehal* in question with other persons who were in possession, and yet he also included it in the *putnee* given to respondent's ancestor, which is evidence of bad faith and deceit. Therefore, on the principle that no person should benefit by his own wrong, the zemindar must be made to refund what he has thus received: and, for the same reason, we further extend the refund beyond 12 years, so as to include the whole of the benefit wrongfully derived. The payments were no doubt voluntary, in so far that the *putneedar* could have thrown up the tenure altogether, on finding he did not obtain possession as agreed. But, on the other hand, it must be noted, that the tenure was a purchase, and perhaps valuable: therefore, though the *putneedar* might, on the score of deceit, have thrown up the tenure, he was not bound to do so; and his claim for remission was fair and equitable, and has been adjudged valid.

On the *second* point, we observe, that previous to the issue of Circular Order of 11th January 1839, the practice of the courts was to admit separate suits for mesne profits, &c.; consequently the claimant for remission in 1836, was not bound to include claim for refund. On the *third* point, we are clearly of opinion that interest should not be awarded, because the *putneedar* elected to sue for possession, and thus deferred his claim for remission during the whole period of the payments for the refund of which he now sues.

We therefore adjudge refund of the payments as claimed, without interest; and thus far amend the decision of the principal sudder

ameen. Costs decreed to appellant and respondent severally in due proportion.

MR. HAWKINS.—This is a suit for recovery of surplus rents paid by a *putneedar* to the zemindar. The rents were paid from 1225 to 1242 B. S. (1818 to 1835 A. D.), and the suit was lodged in 1845.

I consider that the proper remedy, under the circumstances involved in this case, has not been sought at the proper time; and though the plaintiff obtained a former judgment in the zillah court, for a reduction of his annual rent, I do not consider it to be incumbent upon this Court to carry that decree further than its express terms require. I hold it to have been a wrong judgment, but final as to its express provisions. This Court, however, is not required necessarily to extend the wrong which it does. I may observe, moreover, that that decree having been passed by the zillah judge in special appeal, under the then existing law, could not have been carried further, nor could its errors have been rectified by the Sudder Dewanny Adawlut.

The surplus rents, which it is now sought to recover, were not paid upon any lands forming an integral portion of the *putnee mehal*; but upon what is called a *neem-mehal*, or the right of fishery in certain waters within the limits of the *putnee*. When a *putneedar* cannot obtain possession of any portion of the subject of his *putnee*, he should, in the first instance, give notice to the zemindar, and apply for an adjustment of the matter; and if he cannot obtain redress from him, he may sue for possession, or he can relinquish the *putnee*, and sue for a refund of his purchase money. Or admitting, that in such case he is at liberty to claim compensation, or abatement, for the defect in quantity, he is bound to make his claim at once, as *laches*, or neglect, in a case of this kind, must be considered as a waiver of all objections to the contract.

But what are the facts of this case? The *putnee* contract between the zemindar and the father of the plaintiff is dated in 1225 F. S. (or 1817 A. D.) The *putneedar* pays the rent without objection or remonstrance; and in 1229, or four years after the date of the contract, gives a lease of the *neem-mehal* to one Cheedam Mundul. This individual brings an action of ejectment against the holder of a neighbouring *putnee* (the zemindar not being a party to the suit), which was finally dismissed on the 12th January 1833. On the 12th February 1836, that is three years after the dismissal of the suit of Cheedam Mundul, and eleven years after the date of the *putnee* contract, the plaintiff's father sues for an abatement of *jumma*,—this being the first step taken against the zemindar for any defect in the contract, the rents being all the while paid without objection or protest. This suit was finally decided by the zillah judge, in favor of the *putneedar*, on the 16th December 1842. On the 25th September 1845, or twenty-eight years after the date of

contract, the plaintiff sues for a refund of surplus rents, voluntarily paid by his father from 1818 to 1835.

The claim appears to me to be wholly inadmissible ; and I would reject it *in toto*, reversing the decree of the principal sudder ameen.

THE 29TH MARCH 1848.

PRESENT:

A. DICK, Esq.

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.

TEMPORARY JUDGES.

CASE No. 64 of 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Rajshahye, Abdool Ali Khan.

FUKUR OODEEN MOHUMMUD AIIUSSUN *alias*
UZEEM OODEEN, APPELLANT, (DEFENDANT,)

versus

MR. JAMES STEWART, FOR SELF AND FOR R. J. R. CAMPBELL AND A. C. DAVIDSON, RESPONDENTS, (PLAINTIFFS.)

Wukeel of Appellant—Abas Ali.

Wukeel of Respondents—Pursun Komar Thakur.

APPEAL laid at Company's rupees 1,714-12 *annas*, amount decreed of claim on account of indigo plant carried off.

This appeal was preferred to reverse a decision to the above amount, out of a claim for Company's rupees 7,843 4 *annas*, 6 *pie*, on a suit instituted by respondents, on account of indigo plant alleged to have been forcibly cut and carried off by appellant. Appellant denied the claim *in toto*; denied that the lands in question were ever cultivated in indigo, and that he had carried off any of the plant; and affirmed that the suit was out of sheer enmity.

The respondents contended, as they had asserted in their plaint, that the lands had been sown with indigo; and that defendant and others, taking advantage of the factory being left without any one in charge, in consequence of the *gomashita* being in confinement, and respondents absent, cut and carried off the plant which was just fit for reaping.

The principal sudder ameen deeming a portion of the claim established, decreed accordingly.

The judgment in this case is contained in that given in the subsequent decision No. 93 of 1846.

THE 29TH MARCH 1848.

PRESENT:

A. DICK, Esq.,

JUDGE.

W. B. JACKSON and

J. A. F. HAWKINS, Esqrs.,

TEMPORARY JUDGES.

CASE No. 93 of 1846.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Zillah Rajshahye, Abdool Ali Khan.

MR. JAMES STEWART FOR SELF AND FOR R. J. R. CAMPBELL AND A. C. DAVIDSON, APPELLANTS, (PLAINTIFFS,)

versus

FUKUR OODEEN MOHUMMUD AHUSSUN *alias*
UZEEM OODEEN, RESPONDENT, (DEFENDANT.)

Wukeel of Appellants—Pursun Komar Thakur.

Wukeel of Respondent—Abas Ali.

APPEAL laid at Company's rupees 6,530, 14 annas, 11 pie, amount not decreed of a claim on account of indigo.

This is an appeal on the part of the plaintiffs from the same decision as the above, insisting that plaintiffs' witnesses had proved that the two portions of land in question had been both planted with indigo by plaintiffs, and the plant carried off by defendants; and therefore a decision should have been given regarding them, although the right to one of the portions of land was disputed.

To establish their claim the plaintiffs were bound to prove:—*first*, that the lands in question were, as alleged, cultivated in indigo by them; this they could easily have done by producing the servants of the factory who were employed in that cultivation, and the documents connected with it; then, *secondly*, they should have proved, by respectable witnesses, that the defendant had carried it off; instead of which plaintiffs have produced merely a few neighbouring cultivators to depose that defendant, Uzeem Chowdhree, came with 1,000 or 1,200 persons, in 300 or 350 boats, and cut and carried off the whole of the indigo plant of the 675 *biggahs* in a single day, without the least opposition or resistance on the part of the plaintiffs. The Court placing no confidence in the evidence adduced for the claim, which is totally unsupported by the probabilities of the case, reverse the decision of the principal sudder ameen appealed from in case No. 64 of 1846 (preceding) and affirm his decision appealed from in case No. 93 of 1846. Thus dismissing wholly the claim of plaintiffs. Costs in full of both appeals, and of the suit in the lower court, payable by plaintiffs.

THE 30TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 806 OF 1847.

IN the matter of the petition of Ram Kunhye Paramanick, filed in this Court on the 27th December 1847, praying for the admission of a special appeal from the decision of the principal sudder ameen of Moorshedabad, under date the 22d September 1847; reversing that of the moonsiff of Khandee, under date the 10th May 1847, in the case of Ram Lal Das, plaintiff, *versus* the petitioner, defendant.

It is hereby certified that the said application is granted on the following grounds.

The petitioner had attached the chattels of the plaintiff, in liquidation of an arrear of rent due on a *kubooleut*. The plaintiff sued to set aside the attachment: his plaint was dismissed by the moonsiff.

In appeal, the principal sudder ameen reverses the decision of the moonsiff, on the ground that the petitioner might recover his rents from a third party, to whom it was alleged the plaintiff had sold his holding; and further, that the rate at which the petitioner claimed rent was excessive.

The issue in this case was, the legality, or otherwise, of the attachment, and that depended upon the genuineness, or otherwise, of the *kubooleut*, said to have been executed by the plaintiff, in regard to which the principal sudder ameen has recorded no opinion. The grounds upon which he has decreed in favor of the plaintiff, do not appear to be relevant to the real point at issue.

I admit the appeal, and remand the case, which the principal sudder ameen will try *de novo*; recording his opinion expressly as to whether the *kubooleut* is proved, or the contrary.

THE 30TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION No. 681 OF 1847.

IN the matter of the petition of Jeolal, filed in this Court on the 11th November 1847, praying for the admission of a special appeal from the decision of Mr. W. St. Quintin, additional judge of Behar, under date the 11th August 1847; affirming that of the sudder ameen of Behar, under date the 27th July 1846, in the case of the petitioner, plaintiff, *versus* Hurchurn Pundit and others, defendants.

It is hereby certified that the said application is granted on the following grounds.

This was an action to recover possession of 12 *biggahs* of land, under the circumstances set forth in the judge's decision, given at page 123 of the Decisions for Zillah Behar in the year 1847.

The sudder ameen dismissed the claim for want of proof. The judge, in affirming the decree of the sudder ameen, says:—‘The appellant admits, that at the time of the professional survey, these 12 *biggahs* of land were allotted, by the survey authorities, to the village of Chundoodah (the defendant's village); and that he has not instituted a suit to set aside this decision. The sudder ameen has therefore acted quite right in dismissing the present suit.’

The meaning of the judge does not appear to be quite clear in one respect. He does not specify whether he considers the fact of the plaintiff not having sued to set aside the survey adjudication, as corroborative of the evidence against the claim; or whether the fact of not having so sued is sufficient of itself to throw the plaintiff out of court. If the latter, the order should have been one of nonsuit, not of dismissal.

With reference to the foregoing remarks, I admit the special appeal; and remand the case that it may be again brought on the judge's file, and disposed of either by a distinct record of his opinion as to the evidence adduced, or by an order of nonsuit, which will enable the plaintiff to re-institute his suit on an amended plaint.

THE 30TH MARCH 1848.

PRESENT :

J. A. F. HAWKINS, Esq.,

TEMPORARY JUDGE.

PETITION NO. 346 OF 1847.

IN the matter of the petition of Prem Lal, filed in this Court on the 17th June 1847, praying for the admission of a special appeal from the decision of the principal sudder ameen of Patna, under date the 18th March 1847; reversing that of the moonsiff of Hilsa, under date the 9th November 1846, in the case of Rung-lal, plaintiff, *versus* the petitioner, defendant.

It is hereby certified that the said application is granted on the following grounds.

It is unnecessary to enter into the particulars of this case. The principal sudder ameen issued a proclamation for the attendance of the respondent (petitioner) in his court, and decided the case before its term had expired. The proclamation, allowing 15 days, was served on the 8th March, and the case decided on the 18th of the same month. I admit the appeal, and remand the case to the principal sudder ameen's file.

THE 30TH MARCH 1848.

PRESENT :

W. B. JACKSON and

J. A. F. HAWKINS, ESQRS.,

TEMPORARY JUDGES.

E. CURRIE, ESQ.,

EXERCISING THE POWERS OF A JUDGE.

CASE No. 242 OF 1847.

Regular Appeals from decisions passed by the Principal Sudder Ameen of Zillah Rajshahye, February 26th, 1847.

BHYRUB INDURNURAIN RAE, APPELLANT, (PLAINTIFF,)

versus

DOORGAPURSHAD DUT AND BUSUNT KOMAR

GHOSE, RESPONDENTS, (DEFENDANTS.)

Wukeel of Appellant—Pursun Komar Thakur.

Wukeel of Respondent—Kishen Kishore Ghose.

SUIT to enforce the execution of a *kubooleut* and security bond, at a certain specified *jumma*, or else to cancel the *pottah* granted by plaintiff : laid at 10,000 rupees.

CASE No. 250 OF 1847.

BHYRUB INDURNURAIN RAE, APPELLANT,

(DEFENDANT,)

versus

BUSUNT KOMAR GHOSE AND RAMTUNNOO GHOSE,
RESPONDENTS, (PLAINTIFFS.)

SUIT laid at 8,000 rupees, to obtain possession of a certain farm, under a *pottah* granted by defendant, with damages (rupees 2,000) for the period of non-possession.

The subject of action in both these cases is the same, viz. a *pottah* granted by appellant on the 21st *Bhadoon* 1251. The conditions of the *pottah*,—the execution of which is admitted by both parties,—are, that appellant grants to Busunt Komar Ghose a five years' lease of *jote* Aruz, &c., at an annual *jumma* of rupees 9,585, commencing from 1252 B. S.; that the *jumma* of the *mehal* shall be verified in the presence of the tenantry before the end of

Cheyt 1251, when, if it shall fall short of the above mentioned sum, a proportionate deduction shall be allowed, or if it exceed it, an increase paid. That if this verification does not take place, rent shall be paid according to the *mofussil stheeth*; and that, if the zemindar fail to give over possession at the commencement of 1252, he will pay 2,000 rupees annually on account of profits for the period of the lease.

The statement of the zemindar (appellant) is that the respondent, Doorga Dut, was to lend him the sum of rupees 15,000, and that a 5 years' lease of *jote* Aruz &c., was to be granted on his security to Busunt Koomar Ghose; that a *pottah* was written accordingly, and deposited with a *muhajun* named Hukeem Chund. That the *kubooleut* and security bond were to be executed after the verification of the *jumma*; that *ameens* were appointed by the parties for that purpose, and the *jumma* ascertained to be rupees 11,228. That after this Doorga Dut fraudulently obtained possession of the *pottah* from Hukeem Chund, and would not pay the 15,000 rupees, nor execute the *kubooleut* and security bond; that in consequence he sent his own people to collect the rents of the *mehal*, but is still willing to give possession to the *ijarahdar* on the execution of a *kubooleut* and security bond, at the ascertained *jumma* above mentioned.

The other party's statement is that a *pottah* and *amulnameh* were granted, and a *kubooleut* and security bond executed and delivered over in the usual form. That the *pottah* was never in deposit; that no *ameens* were appointed for the verification of the *jumma*. That Ram Tunnoo Ghose (the real *ijarahdar*) went to take possession of the farm in *Bysakh* 1252, but was resisted and refused possession by the zemindar's people; that in consequence he petitioned the magistrate and the collector, and was referred to the civil court. Doorga Dut states that he never promised to lend money to appellant, but that he assisted Ram Tunnoo in negotiating for him a loan of rupees 13,200.

Both parties called witnesses to prove their respective allegations. The principal sudder ameen considered the grant of the farm, and refusal to make over possession to be established; he therefore gave the *ijarahdar* a decree for possession, with rupees 2,000 profits of 1252; and discrediting the allegations of the zemindar, dismissed his suit.

MESSRS. JACKSON AND HAWKINS.—We concur with the principal sudder ameen in finding the facts of the delivery of the farming lease, and the refusal by the zemindar to give possession to be proved. But the question arises whether he was not justified in refusing to give possession. The *pottah* was executed in *Bhadoon* 1251 B. S.; the *jumma*, or amount of rent, therein mentioned, was to a great extent nominal, subject to alteration upon certain

mofussil enquiries to be made by the close of that year. The zemindar states that he took the necessary measures to carry out the terms of the engagement, and he has adduced evidence in support of his statement. His statement, however, is denied by the farmer, who does not even so much as set forth in his plaint that he took any steps whatever towards the fulfilment of the terms of the *pottah*, by having the mofussil rental ascertained, and his *jumma* fixed with reference to it, before the commencement of the year 1252. The terms of the *pottah* filed by the farmer, can be construed, in our opinion, in no other way than that both the zemindar and farmer were to be parties to the mofussil enquiry and adjustment; and as the latter took no steps towards the fulfilment of those terms, we consider that his neglect is a bar to the claim now advanced by him. We accordingly dismiss his suit with full costs, reversing the decree of the principal sudder ameen.

In regard to the zemindar's suit, we do not see that there was any necessity for his coming into court as plaintiff. He does not wish to compel the farmer to execute the *kuboolcut*, provided the *pottah* be cancelled; and the failure of any suit, brought by the farmer, would be tantamount to an annulment of it. We decree in his favor by declaring the *pottah* to be cancelled, but both parties will pay their own costs. The decree of the principal sudder ameen is so far overruled.

MR. CURRIE.—The statement of the zemindar, in regard to the *pottah* having been placed in deposit and surreptitiously obtained by Doorga Dut, is improbable, and unsupported by any trustworthy evidence. He says that no *kuboolcut* and security bond were executed; but this is contradicted by the tenor of the *pottah*, in which their execution is expressly mentioned. Disbelieving this part of his statement, I disbelieve also the allegation respecting the adjustment of *jumma*, which is connected with it. I think that the zemindar was determined to withhold possession; and if such were the case, it would have been useless for the farmer to attempt any measures for the adjustment of the *jumma*, nor does such adjustment appear to me to have been, under the terms of the *pottah*, an indispensable preliminary to his entering on the farm. Concurring with the principal sudder ameen, in thinking that possession has been wrongfully withheld, I am of opinion that the farmer is entitled to such redress as the terms of the *pottah* provide: this is the payment to him by the zemindar of a certain sum annually in lieu of profits, for the period of the lease. I do not think he was warranted in suing for possession. I would, therefore, have modified the decree of the principal sudder ameen, and awarded to the farmer the rupees 2,000, sued for on account of profits for 1252 B. S., dismissing his suit for possession, and I would have dismissed the suit of the zemindar.

THE 30TH MARCH 1848.

PRESENT :

SIR R. BARLOW, BART.,

JUDGE.

CASE No. 112 OF 1845.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, April 8th, 1845

GOUR SOONDUR CHATTERJEE AND ISSUR CHUNDUR
BANERJEE, APPELLANTS, (DEFENDANTS,)

versus

° BISHENNATH SHAH, RESPONDENT, (PLAINTIFF.)

Wukeels of Appellants—Abas Ali and Gopal Kishen Raee.

Wukeels of Respondent—Pursun Komar Thakur and Bunsee Buddun Mitr.

PLAINTIFF, on the 2d Aghun 1248, bought from Peter Jacob Paul an *ousut talookdaree* right to 7 *kanees* of land, situate in the 7 *annas*' share of *jooar Amanutgunge, pergunnah* Chundur-deep, a *talook* recorded in the name of Ram Surrun Sein. The *ousut talookdaree pottah* was originally granted to Alexander Paniotty, from whom, through Peter Jacob Paul and others, it came into plaintiff's hands. The defendants purchased the *talookdar's* rights, which were sold in satisfaction of a summary decree passed in favor of the zemindar, and they received rents of the said 7 *kanees* from the plaintiff; but, subsequently, took *kubooleuts* from the *ryuts* on the land, and then ousted the plaintiff, on which he applied to the magistrate under Act 4 of 1840. The possession, however, of the defendants was upheld both in the *foujdaree* court, and by the session judge.

Plaintiff sues for the reversal of these orders; and lays his action at 5,215 rupees, 4 *annas*, inclusive of *wasilat*.

The defendants, Gour Soondur and Issur Chundur, urge they are entitled to oust the plaintiff, as his tenure was created in 1207, long after the decennial settlement. John Paniotty, a defendant, pleads in support of his co-defendants, and makes objections to the eastern boundary laid down in the plaint. In their rejoinder, defendants state that an action brought by a former *talookdar*, for assessment of *jumma* against a former *ousut talookdar*, was dismissed.

The principal sudder ameen decided that the defendants could not, without having recourse to the courts, oust the plaintiff. He therefore reversed the order of the *foujdaree* court.

The appellants endeavoured to justify their dispossession of the plaintiff under the provisions of the *pulnee* law,—Sections 8 and 11

of Regulation 8 of 1819,—which however is in no way applicable to the case. They also quote summary proceedings of the Court of January, May and July 1837, and the Constructions Nos. 1312 and 1349: none of these bear on the question at issue, which is this. Can the defendants, purchasers of a *talookdaree* right, at sale under Act 8 of 1835, in satisfaction of a summary decree for rent, assume to themselves the power of ousting an under-tenant, the *ousut talookdar*, without application to any authority? The appellants are unable to produce any case in point, and doubtless they have no such power. The courts are open to them to establish their rights be they what they may; and it is incumbent on them to proceed legally, and not to constitute themselves an authority to adjudge their own claims. The appeal is therefore dismissed with all costs; and the plaintiff must be maintained in the same position which he held before he was ejected by the defendants.
